INVESTOR-STATE DISPUTE SETTLEMENT UNDER EU LAW

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Table of abbreviations and frequently used acronyms

Achmea	Slowakische Republik v. Achmea BV, 6 March 2018, Case C-284/16 [ECLI:EU:C:2018:158]
AG	Advocate General to the CJEU
BIT/BITs	Bilateral Investment Treaty/Bilateral Investment Treaties
CETA	Comprehensive Economic and Trade Agreement between the EU and Canada
CJEU/Court	Court of Justice of the European Union
Eco Swiss	Eco Swiss China Time Ltd. v. Bennetton International B.V., 1 June 1999, Case C-126/97 [ECLI:EU:C:1999:269]
ECT	Energy Charter Treaty
EU	European Union
FTA/FTAs	Free Trade Agreement/Free Trade Agreements
Host-state	Signatory state to a BIT or a MIT on whose territory an investment has been made
ICSID	International Centre for the Settlement of Investment Disputes
ISDS	Investor-State Dispute Settlement
MIT/MITs	Multilateral Investment Treaty/Multilateral Investment Treaties
Netherlands-Slovakia BIT	Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic
New York Convention	Convention on the Recognition and Enforcement of Foreign Arbitral Awards
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on the European Union
UNCITRAL	United Nations Commission on International Trade Law
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 General introduction

The compatibility of EU law with the investor-state dispute settlement regime ("ISDS") foreseen under bilateral investment treaties ("BIT"/"BITs") between Member States of the European Union ("EU") has been the subject of vivid debates in doctrine and amongst arbitration practitioners over a number of years.[1]

While proponents of the primacy and autonomy of the European legal order have argued that the delegation of justice to privately constituted arbitral tribunals may encroach on the harmonious application of EU law across the Member States, at the other end of the spectrum, pro-arbitration voices have stressed the necessity of ISDS as a means of safeguarding private investors against infringements of their treaty-protected rights committed by host-states and encouraging transnational investments.

This issue was at the core of in the decision handed down by the Court of Justice of the European Union ("CJEU"/"Court") in the matter of Slovak Republic v. Achmea BV on 6 March 2018[2] ("Achmea"). The decision came following a request for a preliminary ruling lodged with the Court by the German Bundengerichtshof on 23 May 2016 pursuant to Article 267 of the Treaty of the Functioning of the European Union ("TFEU"). The request was submitted in the context of an action in annulment against a final award dated 7 December 2012 issued by an arbitral tribunal established under a BIT between the Netherlands and the Czech and Slovak Federal Republic[3] ("Netherlands-Slovakia BIT"). The arbitration matter had been initiated by a Dutch investor adversely affected by the reversal of the liberalisation of Slovakia's private health insurance sector. During the arbitration, Slovakia raised a jurisdictional plea on grounds, *i.a.*, that the ISDS clause in the BIT was incompatible with EU law. The subsequent challenge to the award was largely based on the same reason.

In its landmark decision, the CJEU trenched forcefully against the validity of such ISDS provisions in intra-EU BITs, holding that:

[1] For an overview of the various legal issues and doctrinal approaches, see e.g., Chapter 5, "Intra-EU International Investment Agreements" in Tom Fecak, "International Agreements and EU Law", Kluwer Law International 2016, pp. 371-378

[2] Slowakische Republik (Slovak Republic) v. Achmea BV, 6 March 2018, Case C-284/16 [ECLI:EU:C:2018:158]

[3] Agreement on Encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (1991); Slovakia succeeded the Czech and Slovak Federal Republic as a party to the BIT

> *"Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept*.[4]" (Emphasis added).

With the insertion of the wording "such as" in the dispositive, in one sweeping statement, the CJEU invalidated the ISDS mechanism contained in all of the BITs concluded between EU Member States, *i.e.*, no less than 190 treaties.[5]

The ruling of the CJEU in Achmea is the culmination of many years' growing opposition to ISDS at the EU - and global levels. The so-called "backlash" against ISDS has been attributed to a variety of causes, *e.g.*, the perceived lack of accountability and democratic legitimacy of the arbitral process and a fear of "regulatory chill" (governments' loss of their right to regulate).[6]

Although the ruling purports to clarify the position of the law as to the conformity of arbitration proceedings under intra-EU BITs with EU law, it raises more questions than it answers. This being said, there can be little doubt that Achmea will permanently alter the ISDS landscape. Effectively, in response to the Court's decision, the EU Member States have, in a joint statement of January 2019, announced their intention to terminate all intra-EU BITs by December 2019.[7] Nevertheless, unpacking the meaning and scope of the decision remains relevant in relation to the many cases currently pending under such intra-EU BITs. In 2017, one fifth of all BIT cases were brought under intra EU-BITs and still intra-EU disputes represent 20% of all ISDS cases globally.[8] This figure is expected to radically decrease due to the "Black Tuesday effect" of the Achmea judgement.[9] The question of the scope of the Achmea decision also arises in relation to arbitration procedures under the Energy Charter Treaty ("ECT"). A different question, with direct practical and economic

[4] Achmea, para. 62
[5] Estimate of 'The Transnational Institute' available at: https://www.tni.org/es/node/1567; accessed on 11 May 2019)
[6] Stephan Balthasar, "Investment Protection in Europe: International Investment Treaties, the European Convention on Human Rights and the Need to Reform at EU Level" in Jörg Risse, Gûnter Pickrahn *et al.* (eds.), SchiedsVZ - German Arbitration Journal, Vol. 16, Issue 4 (2018), p. 3
[7] Declaration of the Representatives of the governments of the member states of 15 January 2019 on the legal consequences of the Court of Justice in Achmea and on investment protection in the European Union
[8] United Nations Conference on Trade and Development (UNCTAD), Investor-State Dispute Settlement: Review of Developments in 2017, IIA Issue Note II of June 2018, p. 2
[9] Nikos Lavranos and Tania Singla, "Achmea: Groundbreaking or Overrated?" in Jörg Risse, Günter Pickrahn *et al*. (eds.) SchiedsVZ German Arbitration Journal (© Kluwer Law International: Verlag C.H. Beck oHG 2018, Volume 16, Issue 6) p. 350

implications, is how current and prospective investors will respond to the material and procedural void in the protection of their rights created by the CJEU in Achmea.

The predominantly hostile reception of the decision in the arbitration community[10] appears all the more justified in view of the seemingly opposite trend at the external norm-making level of the EU, as multiple new free trade agreements ("FTAs") with third countries are currently being negotiated - all of which contain elaborate ISDS provisions.[11] However, a study of the ISDS regime contemplated under the new generation of FTAs reveals that, rather than being in opposition to the stance taken by the CJEU against traditional ISDS, they accentuate this general trend. The "hybrid" system foreseen under these agreements marks a first step towards the establishment of a multilateral investment court intended to replace de current *ad hoc* ISDS regime. In view of Achmea, the question of the compatibility of these new, bilateral instruments with EU law nevertheless arises. The CJEU very recently rendered an opinion upholding the validity of the contemplated mechanism under EU law.[12]

1.2 Delimitation of the subject and choice of method

The purpose of the dissertation is to describe, explain and assess the stance taken by the EU on the subject of ISDS. The transversal nature of the subject matter - sitting somewhat at the intersection of general international law and EU law - occasions some additional complexity with respect to methodology. This is due both to the plurality of sources of law relied on as well as their varying normative "value".

The methodological approach chosen is primarily "dogmatic".[13] That is to say, the discussion will repose primarily on sources of law such as treaties and, in particular, international - and EU case law in order to describe the current position of the law. However, the dissertation also discusses underlying policy concerns[14] and offers an assessment of the recent developments. As such, the method cannot be described as purely "dogmatic". The dissertation furthermore refers to doctrinal works and other legal publications. As a matter of Danish law, it is debated whether academic writings

[10] For one of the more outspoken critiques of Achmea, see "ASA Board Message, The Costs of Achmea" in Matthias Scherer (ed.) ASA Bulletin, © Association Suisse de l'Arbitrage; Kluwer Law International 2018, Volume 36, Issue 3; For a more nuanced approach, see Lavranos & Singla, supra. n. 9; for a predominantly positive approach, see Steffen Hindelang, "The Limited Immediate Effects of CJEU's Achmea Judgement", VerfBlog, 2018/3/09, https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/, DOI: https://dx.doi.org/10.17176/20180309-092343

[11] Lavranos & Singla, supra. n. 9, p. 351

[12] Opinion 1/17 of 30 April 2019 [ECLI:EU:C:2019:341]

[13] In Danish: "retsdogmatisk"; see Peter Blume, "Juridisk metodelære", 5. udgave, Jurist- og Økonomforbundets Forlag 2009, p. 68 and p. 161

[14] In Danish "retspolitik"; *Ibid*., p. 165

may be considered as "normative" in their own right. However, it is generally accepted that they may be relied on in order to clarify the content and meaning of other sources of law.[15] Moreover, under international law, doctrinal works, together with judicial decisions, are recognised as a "*subsidiary means for the determining the applicable rules of law*".[16]

The main part of the dissertation is dedicated to recent legal developments internal to the EU order and, in this respect, particular attention will be given to the Achmea judgment. Confirming that the CJEU's decisions have a strong normative value is hardly controversial (seeing as these are considered a part of the "aquis communutaire" and binding on the courts and authorities of the Member States).[17] In order to situate Achmea within its broader context and meaningfully discuss its bearing, it is necessary to also include prior and subsequent practice of arbitral tribunals and domestic courts. It may be argued that international arbitration case law cannot be considered on an equal footing with decisions by the CJEU or national courts because of its inherently private (*intra partes)* character (as opposed to the *erga omnes* character of decisions rendered by the CJEU and superior national courts). Although it is true that there is no general rule of *stare decisis*[18] in international arbitration, the awards preceding Achmea denote a clearly discernable and consistent trend of arbitral tribunals upholding their jurisdiction when confronted with objections on the basis of EU law. As suggested by one commentator, it may be precisely because arbitral tribunals have a relatively strong norm-making potential that their legitimacy is currently under such strong attack.[19] Consequently, decisions by arbitral tribunals cannot be dismissed as a source of law.

The final section discusses whether the position taken against ISDS is also detectable in the foreign relations of the EU. In this respect, the main focus will be on the ISDS system foreseen under the FTAs currently in the pipelines with a number of the EU's main trading partners. To this end, it will be necessary to rely on unratified treaties. It should be noted that conventions between the EU and third parties form an integral part of the EU legal order. This follows from Article 216(2) FTEU whereby "*agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*". Accordingly, these FTAs will, once formally ratified, enjoy primacy over domestic law like other EU norms. As such, while these documents may not yet be *de lege lata*, they

[15] *Ibid.*, p. 54 and pp. 68-69
[16] *E.g.*, pursuant to Article 38(1)(d) of the Statute of the International Court of Justice, which codifies customary law
[17] Anthony Arnull *et al.*, "European Union Law", 5th edition, Sweet and Maxwell 2006, p. 389
[18] In Danish: "præjudikatværdi"
[19] Michael de Boeck, "Chapter 15: Arbitral Preliminary References: The New York Convention Regime as Adequate Mechanism for Compliance under Article 267 TFEU" in Katia Fach Gomez and Ana M. Lopez-Rodriguez (eds), 60 Years of the New York Convention: Key Issues and Future Challenges", Kluwer Law International 2019, p. 239

are certainly indicative of the *lex ferenda*[20] as they point to one clear objective: The abandonment of traditional ISDS in favour of a global regime more akin to a supra-national court.

1.3 Structure

The dissertation will begin with a section introducing the key concepts and normative framework underlying the analysis in the following sections. This section 2 will provide a brief overview of the investor protection regime under international BITs and will briefly explain the "backlash" against ISDS observed in recent years. Section 2 will then provide a cursory overview of the EU legal order, outlining some of the distinctive features of EU law, which may conflict with intra-EU BITs.

Section 3 will be dedicated to the landmark decision handed down in Achmea. After laying out the position of the law as it stood prior to the judgment, the focus will be on content, reach and implications of the decision itself.

The final section (Section 4) examines the approach taken to ISDS in the external relations of the EU. In this regard, emphasis will be on the CETA, which has partially entered into force, pending completion of the ratification process.

2. Conceptual and normative framework

This section will briefly introduce the protection scheme available to investors under BITs, as well as some of the points of critiques that have been formulated against this system in recent years. The sections will also address the interface between the BIT system and the EU legal order and the perceived incompatibility between key-features of the EU law and intra-EU BITs.

2.1 Overview of the BIT system

A BIT is a legal instrument entered into between two sovereign states with a view to facilitating investments.[21] To this end, BITs confer specific rights onto private entities and individuals which can be invoked directly against the host-state. In that, they differ from most other international treaties which regulate inter-state relationships.[22]

[20] Blume, supra. n. 13, p. 71
[21] Gary B. Born, "International Arbitration: Law and Practice", Kluwer Law International BV 2012, p. 412
[22] Ole Spiermann, "Moderne Folkeret", 3. udgave, 5. oplag, Jurist- og Økonomforbundets Forlag 2006, p. 185

2.1.1 BITs in the international legal order

Investments abroad involve a risk that the host-state might - directly or indirectly - interfere with the foreign investor's enterprise.[23] Such risks include, *e.g.*, the unlawful expropriation of physical assets without fair compensation (direct interference) or the passing of targeted levies and taxes or other unfavourable regulatory measures (indirect interference). These risks can be elevated in developing countries with weak or unstable governance.

Generally, contractual rights are inadequate to address this type of interference and litigation before national courts is not usually a viable means of redress against the host state on account of, *e.g.*, pro-state bias of local courts and the risk that the host-state might try to avail itself of sovereign immunity to elude liability.[24] Diplomatic espousal of the foreign investor's claims by the home-state will, for political reasons, often not be an option.[25]

In order to alleviate these risks, a significant number of BITs have been concluded world-wide in the past decades. A number of investment protection agreements with similar substantive protections and procedural guarantees have been concluded in multilateral settings, for example, the ECT, to which both the EU and the Member States[26] are parties.

BITs and multilateral investment treaties ("MITs") are designed to encourage investments in two ways.

Firstly, BITs set out substantive protection standards that host-states must observe *vis-à-vis* investors of the other state, ensuring, *e.g.*, that they enjoy fair and equal treatment compared to nationals of the host-state and that the host-state actively takes reasonable measures to protect the investment.

Secondly, BITs afford investors with a direct, treaty-based cause of action against the host-state interfering with (or failing to adequately protect) the investment. BITs usually provide for dispute resolution at a neutral venue and leaves the investor with a choice between several possible dispute resolution fora.

[23] Christopher F. Dugan *et al*., "Investor-State Arbitration", Oxford University Press 2008, p. 7;
[24] *Ibid*, pp. 13-14; Born, supra. n. 21 p. 412
[25] Born, supra. n. 21, p. 411
[26] Except Italy

Notwithstanding their distinctive features, BITs remain instruments of general international law and are, as such, subject to the customary rules applicable to the interpretation and application of treaties as codified at the Vienna Convention on the Law of Treaties of 1969 ("VCLT").

2.1.2 Substantive and procedural rights under BITs

Substantive rights

Each BIT is tailored to match the specific needs of the contracting parties in question. Nevertheless, there is a clear tendency towards an alignment of the protections found in BITs.[27] At the substantive level, BITs generally comprise very broad protection standards incumbent on the host-state. With some variation, these are:[28]

- *"National treatment" and "prohibition of discrimination"* ensure that foreign investors are granted the same benefits as local businesses and not otherwise discriminated against on account of their foreign nationality, and the *"fair and equitable treatment"* standard ensures that foreign investor is not otherwise treated unfairly.

- *"Prohibition of expropriation without compensation"* means that foreign investors can seek compensation for unlawful expropriation.

- *"Full protection and security"* requires the host-state to actively assist the investor in preserving the investment (*e.g.*, deploying its police force when necessary etc.).

- "*The umbrella clause*" requires the host-state to observe contractual obligations in relation to the investment. As such, it elevates contract-breaches to the level of treaty-breaches.

In the event of a breach of any of the above standards by the host-state, the foreign investor may seek redress in accordance with the dispute resolution mechanism provided for in the BIT.

Procedural protections

As noted by Advocate General Bot ("AG Bot") in his Opinion dated 29 January 2019 concerning the conformity of the Comprehensive Economic and Trade Agreement between the EU and Canada

[27] Born, supra n, 21, p. 415
[28] For a comprehensive description of the substantive protections found in modern BITs, see, e.g., Dugan *et al*., supra n. 23, pp. 397-558 and Born, supra n. 21, pp. 429-433

("CETA") with EU law, one of the specificities of the BIT system is to have removed the resolution of disputes from the diplomatic - and political spheres and "outsourced" the settlement of legal differences to a supposedly more neutral body.[29]

Dispute resolution mechanisms vary from treaty to treaty. However, although under some BITs, the investor may also opt for litigation before the national courts, the majority of BITs provide for international arbitration as a method for resolving disputes.[30] In most cases, several arbitration fora, at the election of the foreign investor, are listed, the most common ones being institutional arbitration under the auspices of the International Centre for the Settlement of Investment Disputes ("ICSID") and *ad hoc* arbitration under the procedural rules of the United Nations Commission on International Trade Law ("UNCITRAL"). References to other institutions, such as the International Chamber of Commerce in Paris or the Stockholm Chamber of Commerce (alongside others) are also occasionally seen.[31]

It would be well beyond the scope of this dissertation to provide a comprehensive overview of ISDS procedure in all its shapes and forms, however, the key-characteristics of international arbitration (be it commercial - or investment arbitration) may be summarised as follows:

- The arbitral tribunals deciding the case consist of private individuals appointed by the parties (potentially with the assistance of the institution administering the case). Arbitrators are subject to strict requirements of independence and impartiality and must immediately disclose any circumstance that may be of a nature to bring into question their independence and/or impartiality in the eyes of the parties;[32]

- The arbitration proceedings will usually be formally "seated" in the territory of a neutral state and the procedural law of the seat (*lex loci arbitri*) will govern the proceedings insofar as the parties have not otherwise agreed (for example by pre-selecting existing institutional rules in their arbitration agreement) or whenever an aspect of the procedure is not covered by the arbitration agreement or pre-selected rules;[33]

[29] Opinion of Advocate General Bot delivered on 29 January 2019, Opinion 1/17 [ECLI:EU:C:2019:72], para. 13
[30] Born, supra n. 21, p. 416
[31] Dugan *et al*., supra n. 23, pp. 77-78; Born, supra n. 23, p. 416
[32] Dugan *et al*., supra n. 23, pp. 128-129
[33] Fecak, supra n.1, p. 400

- The arbitral tribunal decides the merits of the case on the basis of the governing law *(lex causae)* designated by the parties or set out in the BIT. Failing an agreement or choice-of-law clause, the governing substantive law is determined by the arbitral tribunal.[34] Certain BITs contain choice-of-law clauses while others leave the determination of the applicable law at the arbitral tribunal's discretion.[35] The applicable law includes the substantive provisions of the contract or BIT in question;[36]

- Arbitral awards are (almost) universally enforceable due to the operation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York in 1958 ("New York Convention") which is one the most widely ratified treaties worldwide.[37] Under the New York Convention, arbitral awards may be enforced in the territory of any signatory state where the loosing party has assets.[38]

- Arbitral awards are final and legally binding upon the parties, *i.e.*, there is no "second instance" of appeal. The scope for judicial review by the state courts is very narrowly defined in nearly all domestic arbitration acts, which are for the most part based on the Model Law issued by UNCITRAL.[39] In general, a domestic court will only annul or deny the enforcement of award in circumstances where the arbitration procedure suffers from grave procedural irregularities, *e.g.*, violations by the arbitral tribunal of fundamental procedural guarantees or of public policy provisions. According to the case law of the CJEU, as set out in the 1999 Eco Swiss case,[40] such provisions of public policy include fundamental principles of EU law.[41] As explained in more detail below, the scope for review of ISCID-awards is even narrower due to the "self-contained" and "delocalised" nature of the ISCID-regime.

[34] *Ibid.*, p. 401
[35] *Ibid.*, p. 402
[36] *Ibid.*, p. 403
[37] Dugan *et al.*, supra n. 23, p. 679
[38] Born, supra n. 21, pp. 275-276
[39] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
[40] Eco Swiss China Time Ltd. vs. Bennetton International B.V., 1 June 1999, Case C-126/97 [ECLI:EU:C:1999:269]
[41] Fecak, supra n. 1, p. 423

2.1.3 The "backlash" against ISDS

Traditional ISDS has been forcefully criticised in the past years.[42] In his Opinion on the CETA (treated in more detail in Section 4 below) AG Bot enumerates the most frequent reproaches against ISDS, *e.g.*, the perceived lack of legitimacy of the arbitrators and/or insufficient guarantees of their impartiality and independence, the lack of transparency of the process and thus a high degree of judicial unpredictability, as well as the risk that the democratic process may be unduly halted for fear that the state will be met with substantial claims from foreign investors adversely affected by new regulations.[43] It has been suggested by certain commentators that the "back-lash" against ISDS may be ascribed to a novel tendency of investors to make use of the system against traditionally capital exporting states rather than concerns of transparency and democracy.[44]

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2.2 Overview of the EU legal order

At the core of the Court's reasoning in Achmea are the concepts of autonomy, direct effect and primacy of EU law over other sources of law. These are all considered an integral part of the EU constitutional order. Over the years, the CJEU has proclaimed itself the guardian of this order, which it oversees, *i.a.*, through the mechanism of preliminary questions under Article 267 TFEU, allowing national courts to refer questions pertaining to the correct interpretation and/or application of EU law to the CJEU when they arise in the context of a domestic proceeding.

2.2.1 The constitutional structure of EU law

The notion that EU law - *i.e.*, the constitutive Treaties and "droit dérivé" (institutional acts and the case law of the CJEU) - may produce direct effects and operate as an "*autonomous source of law within the national legal systems*" is a discovery of the CJEU itself.[45]

[42] Born, supra. n. 21, p. 418
[43] Opinion of AG Bot, supra n. 29, para. 13
[44] Piero Bernadini, "The European Union's Investment Court System - A Critical Analysis" in Matthias Scherer (ed) ASA Bulletin © Association Suisse de l'Arbitrage; Kluwer Law International 2017, Volume 35 Issue 4, p. 813
[45] Alan Dashwood *et al.*, "Wyatt and Dashwood's European Union Law"6th ed., Hart Publishing, 2011, p. 61

In the early case of van Gend in Loos,[46] the Court affirmed the Treaty of Rome was an independent source of rights and obligations within the domestic legal orders, together with - but also independently of - the Member States' own constitutions, legislation etc.:[47]

> *"(...) the states have acknowledged that community law has an authority which can be invoked by their nationals before those courts and tribunals. The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community."*[48](Emphasis added).

In this early decision, the CJEU laid down two fundamental principles of EU law: (i) the direct effect; and (ii) the autonomous operation of EU law within the domestic legal orders. These principles, together with the concept of "primacy" - another discovery of the CJEU from the Costa v. ENEL case - have since guided the action of the Court and the institutions of the EU.

In the 1964 decision of Costa v. ENEL[49] the CJEU declared that, not only was EU law capable of producing direct effects in the domestic orders of the Member States, it also took precedence over any conflicting rules of national or international law applicable in the Member States:

> *"By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.*
>
> *By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.*
>
> *[...]*
>
> *It follows from all these observations that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be*

[46] NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, 5 February 1963, Case 26-62 [ECLI:EU:C:1963:1]
[47] Dashwood *et al*., supra n. 45, p. 237
[48] Van Gend & Loos, supra n. 46, "Grounds of Judgment" at II(B)
[49] Flaminio Costa v E.N.E.L., 15 July 1964, Case 6-64 [ECLI:EU:C:1964:66]

> *overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question".*[50]

As a consequence, in the event that a rule of national law is contrary to a norm issued by the EU, it must be set aside and the provision of EU law applied instead.[51] It follows that, questions of interpretation of provisions of domestic law must be resolved by the national courts and authorities in a manner that favours conformity with EU law. The CJEU identified this "duty of consistent interpretation" in the 1984 case of von Colson. [52]

2.2.2 The CJEU as the guardian of the EU constitutional order

One of the principal missions of the CJEU, as stated in Article 19(1) TEU, is to insure the harmonious application of the law issued by the European institutions across the Member States.

The CJEU performs this task, *i.a.*, through the mechanism of judicial "dialogue"[53] set out at Article 267 TFEU:

> *"The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*
>
> *(a) the interpretation of the Treaties;*
>
> *(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;*
>
> *Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.*
>
> *Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.*
>
> *If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."*

The exclusivity of the Court's competence of matters of EU law is reinforced by Article 344, pursuant to which:

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[50] *Ibid.*, at "Grounds of Judgment"
[51] Fecak, supra. n. 1, pp. 390-391
[52] Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen, 10 April 1984, Case 14/83 [ECLI:EU:C:1984:153]; see also Dashwood *et al.*, supra n. 45, p. 239
[53] The term "dialogue" was coined by the CJEU itself; see, *e.g.*, Achmea, para. 37

> "*Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein*."

Although the responsibility for ensuring uniformity in the application of provisions of EU law rests largely with domestic courts and tribunals,[54] by virtue of Articles 267 and 344 TFEU, the CJEU has the final "say" when it comes questions of EU norms.

The decision in Achmea is premised on the Court's finding that the ISDS mechanism found in the Netherlands-Slovakia BIT may operate as a means for Member States to undermine the control mechanism in Article 267 TFEU by delegating the handling of certain disputes to arbitral tribunals who might be called upon to apply or interpret EU law, without them having access to the preliminary questions procedure. As such, the decision of the CJEU in Achmea may be read as a bolstering of the Court's exclusive competence ("monopoly") in issuing final interpretations of EU law.

2.2.3 The contradiction between intra-EU BITs and EU law

The potential for conflict between intra-EU BITs and EU law has been a "hot topic" in case law and doctrinal debates for some time. Nonetheless, the force with which the CJEU struck against ISDS provisions in intra-EU BITs in Achmea is surprising.

Indeed, the existence of BITs seems *prima facie* compatible with the purpose of the EU to create an open market and facilitate the free movement of services, capital and goods. As noted by one commentator, BITs and the EU Treaties are both concerned with the protection of foreign investments.[55] Invariably, the stated purpose of BITs, as per their preambles, is to further investments between the signatory states. By way of example, the preamble of the Netherlands-Slovakia BIT declares that:

> *"Desiring to intensify and extend the economic relations between them particularly with respect to investments by the investors of one Contracting Party in the territory of the other Contracting Party,*
>
> *Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment is desirable"*

[54] Arnull *et al*., supra n. 17, pp. 504-505
[55] *Ibid*., p. 518

This being said, the apparent substantive overlap begs the question of whether intra-EU BITs predating the signatory states' accession to the EU might have been terminated or suspended at the occasion of the relevant state's entry into the EU, *e.g.*, by the operation of the principle of *lex posteriori*[56] whereby a later treaty will supersede a more ancient insofar as there is congruence between the treaties' subject matter and provided that the signatory parties either intended for the termination of the other treaty or their provisions make them incapable of being applied at the same time. [57]

As explained by one commentator, whether there is such incompatibility of the subject matter depends on whether "*the obligation under one treaty affects the fulfilment of the obligation of another*" which might occur "*either as strictly preventing the fulfilment of the other obligation or undermining its object or purpose in another way*". [58]

It is difficult to see which of the substantive protections afforded to investors under BITs would produce results incompatible with the content and purpose of the EU Treaties. Indeed, the two regimes appear "*complementary rather than contradictory*".[59] Nevertheless, the Court opted for a firm stance against ISDS in Achmea - albeit not on the basis of the *lex posteriori* principle or other rules of general international law. There can be several reasons for this attitude. It has been suggested that part of the explanation may be attributed to the entry into force of the Lisbon Treaty in 2009 whereby the Member States' competence in the field of "foreign direct investments" were transferred to the EU. Although this only directly affects agreements with third countries, the need to define the interplay between BITs and the EU order naturally resurfaced as a topic for discussion.[60] Another part of the explanation may be that the "back-lash" against the EU, *i.e.*, the institutional and political crisis suffered by the EU in the past decade, has fostered the conditions for an increasingly zealous approach within the EU institutions, and in particular the CJEU, when it comes to preserving and extending their competence.

Regardless of whether and to which extent the institutional crisis of the EU and the entry into force of the Lisbon Treaty have contributed the decision reached in Achmea, it is indisputable that the EU

[56] Codified, *e.g.*, at Article 59 of the VCLT
[57] The issue has been raised, *i.a.*, by Thomas Eilmansberger, "Chapter V: Investment Arbitration - Bilateral Investment Treaties and EU Law" in Christian Klausegger, Peter Klein et al. (eds), Austrian Arbitration Yearbook 2009, Austrian Yearbook on International Arbitration, Volume 2009 p. 519
[58] Fecak, supra n. 1., p. 388
[59] Eilmansberger, supra n. 57, p.524
[60] Fecak, supra n. 1, p. 372

has embarked on a set course to do away with the traditional scheme for ISDS both in its internal and external norm-making.

3. Intra-EU developments in the field of ISDS

The following sub-sections will examine the position if the law prior to Achmea before turning to the content, scope and implications of the decision itself.

3.1 The arbitration landscape pre-Achmea

An overview of the case law and institutional practice prior to the Achmea judgment denotes a sharp contrast between the permissive position taken by arbitral tribunals established under intra-EU BITs, on the one hand (sub-section 3.1.1) and an increasingly restrictive practice of the EU, on the other (sub-section 3.1.2).

3.1.1 Investor-state arbitration case law

As the Advocate General in charge of the Achmea matter ("AG Wathelet") remarked in a footnote to his observations to the Court, there is a substantial body of consistent case law wherein arbitral tribunals - constituted under various BITs and procedural rules - have been confronted with objections on the basis of an (alleged) incompatibility between a given BIT or MIT with EU law. In none of these instances, the arbitral tribunals have found any such incompatibility - neither on the basis of general international law nor the law of the EU. [61]

Respondent-states have often attempted to elude liability under a BIT by referring to the incompatibility of the BIT with EU law. In early case law, the arguments were constructed primarily around concepts of general international law. Specifically, the state referred to the customary rules concerning the application of successive treaties governing, wholly or in part, the same subject matter, set out at Article 59 and 30 of the VCLT:

Article 59 of the VCLT provides that:

> *"Termination or suspension of the operation of a treaty implied by conclusion of a later treaty*
>
> *1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:*

[61] Opinion of Advocate General Wathelet delivered on 19 September 2017, Case C-284/16 [ECLI:EU:C:2017:699], foot note 7

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
(b) the provisions of the later treaty are so far incompatible with that of the earlier one that the two treaties are not capable of being applied at the same time.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties."

Pursuant to Article 30(3) of the VCLT:

"Application of successive treaties relating to the same subject-matter

When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible to those of the later treaty."

The general international law argument was at the heart of the respondent-state's case in Eastern Sugar BV. v. Czech Republic (award dated 2007).[62] In support of its jurisdictional pleas, the Czech Republic argued, *i.a.*, that the BIT had been superseded and/or rendered inoperative by the subsequent accession of the Czech Republic to the EU.[63] It was also contended that the ISDS mechanism set out at Article 8 of the BIT in question was contrary to the principles of non-discrimination and mutual trust as a matter of EU law.[64] All of these arguments were rejected by the arbitral tribunal which did not accept neither the contention that the treaties covered the same subject matter[65] nor that they were incapable of applying simultaneously. In the arbitral tribunal's view, the rules on the free movement of capital protected by the EU Treaties and the concrete guarantees afforded to investors under BITs were complementary in nature, rather than contradictory or overlapping.[66]

The objections presented by respondent-states in subsequent cases have been more specifically tailored to the *sui generis* character of EU law and the particular obligations incumbent on the Member States under the EU Treaties. For instance, in the matter of Rupert Joseph Binder v. Czech Republic (award on jurisdiction dated June 2007)[67] the arguments based on general international law and the VCLT[68] were supplemented by EU law specific arguments going to the principles of primacy,

[62] Eastern Sugar BV v. Czech Republic (UNCITRAL), SCC No. 088/2004, partial award of 27 March 2007
[63] *Ibid.*, paras. 100-105
[64] *Ibid.*, paras. 106-107
[65] *Ibid*., paras. 159 *et seq*.
[66] *Ibid.*, paras. 168-169
[67] Rupert Joseph Binder v. Czech Republic (UNCITRAL), award on jurisdiction of 6 June 2007
[68] *Ibid.*, para. 19

mutual trust, jurisdictional monopoly of the CJEU[69] as well as non-discrimination.[70] The arbitral tribunal largely sidestepped the arguments based on general international law, noting that, in any event, the circumstances complained of predated the accession of the Czech Republic to the EU, which meant that they had occurred at a time when the BIT was undisputedly in force.[71] As to the EU law-specific arguments, the arbitral tribunal stated that it could not find any substantive opposition between the provisions of the BIT, hereunder the dispute resolution clause,[72] and the law of the EU.[73]

A similar view was taken by another arbitral tribunal a few years later in the case of Jan Oostergetel & Theodora Laurentius v. Slovak Republic (award on jurisdiction of April 2010).[74] However, the arbitral tribunal went further than those sitting over the Eastern Sugar and Binder cases as it expressly confirmed that that, in addition to the substantive provisions of the BIT itself, the arbitral tribunal was habilitated to consider EU law provisions in its assessment of the dispute. In this respect, the arbitral tribunal held that it was undisputable that EU law formed part of the law that it was under an obligation to apply under the terms of the BIT itself. The arbitral tribunal did however stress that it must endeavor to do so in a manner that would reduce conflicts between EU law and the BIT.[75]

The decision in the case of Jan Oostergetel belongs to a sequence of arbitration case law which apprehends EU law as an element to be considered as part of the factual matrix of the matter rather than a potential obstacle to jurisdiction. This approach was endorsed by the arbitral tribunal sitting over the case of AES Summit Generation Limited & AES -Tisza Erömü Ktf v. Hungary (award of September 2010),[76] arising under the ECT. In this instance, it was common ground between the parties that, in international arbitration, national law (including EU law) must be considered as facts. On this basis, the arbitral tribunal held that it could take into consideration EU competition law as a factual element and, furthermore, noted that such EU law could never be validly invoked as a defense by a state in breach of its international law obligations under the ICSID Convention - thus negating any primacy of EU law.[77] The arbitral tribunal hearing the matter of RREEF Infrastructure GP

[69] *Ibid.*, para. 11-17
[70] *Ibid.*, para. 18
[71] *Ibid.*, para. 62; a similar approach was taken in Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, final award of 11 December 2013, see para. 321
[72] *Ibid.*, para. 65
[73] *Ibid.*, para. 63-66
[74] Jan Oostergetel & Theodora Laurentius v. Slovak Republic (UNICITRAL), decision on jurisdiction of 30 April 2010, paras. 74 and 90.
[75] *Ibid.*, paras. 99-100
[76] AES Summit Generation Limited & AES -Tisza Erömü Ktf v. Hungary, ICSID No. ARB/07/22, award of 23 September 2010
[77] *Ibid.*, para. 7.6.6.

Limited and RREEF Pan-European Infrastructure Two Lux Sarl v. Kingdom of Spain (award of June 2016)[78] took a similar approach to the prevalence of the ECT over EU law - although it conceded that, insofar as it was possible without denaturing them, these instruments should be interpreted in a consistent manner.[79]

The award issued in the case of Achmea (formerly Eureco BV) also belongs within this sting of case law.[80] In dismissing the jurisdictional pleas of Slovakia, the arbitral tribunal specifically stated that EU law forms part of the substantive national law that it had to apply to the merits of the case, pursuant to the wording of the BIT itself as well as the *lex loci arbitri* (German law). [81]

In subsequent cases, the respondent-states' jurisdictional pleas have often focused more squarely on Article 344 TFEU, which prohibits Member States from referring disputes concerning the application or interpretation of the Treaties to any means of dispute resolution other than those foreseen under the Treaties themselves. The salient question in relation to Article 344 FTEU is whether it covers scenarios submitted by a private legal entity against a state or whether it only applies to disputes commenced by Member States.

The various state-parties' purported extension of the scope of Article 344 TFEU to also comprise disputes between a state and an investor has been systematically rejected in arbitration case law.[82]

The restrictive reading of Article 344 TFEU appears to have had some credence with the CJEU in the past, as illustrated by the opinion rendered at the request of the European Council on the question of whether the creation of a Permanent Patents Court was contrary to the exclusive competence of the CJEU.[83] In answering this question, the Court more than implied that Article 344 TFEU is only applicable to disputes between Member States:

> *"Nor can the creation of the PC be in conflict with Article 344 TFEU, given that that article merely prohibits Member States from submitting a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those*

[78] RREEF Infrastructure GP Limited and RREEF Pan-European Infrastructure Two Lux Sarl v. Kingdom of Spain, ICSID Case No. ARB/13/30, decision on jurisdiction of 6 June 2016
[79] *Ibid*., paras. 75-76
[80] Achmea BV (formerly known as Eureko BV) v. Slovak Republic, PCA Case V. 2008-13, award on jurisdiction, arbitrability and suspension of 26 October 2010
[81] *Ibid*., para. 279 and paras. 281-282.
[82] Charanne BV and Construction Investment Sarl v. Kingdom of Spain, SCC Case V 062/2012, final award of 21 January 2016, para. 444; Anglia Auto Accessories Limited v. Czech Republic, SCC Case V 2014/181, final award of 10 March 2017, paras. 126-128; IP Busta and JP Busta v. Czech Republic, SCC Case V 2015/014, final award of 10 March 2017, paras. 126-128; Eise Infrastructure Limited and Energia Solar Luxembourg Sarl v. Kingdom of Spain, ICSID Case No. ARB/13/36, award of 4 May 2017, para. 204
[83] Opinion 1/09 of 8 March 2011 [ECLI:EU:C:2011:123]

> *provided for in the Treaties. The jurisdiction which the draft agreement intends to grant to the PC relates only to disputes between individuals in the field of patents."*[84] (Emphasis added).

Accordingly, the Achmea judgement appears to constitute a departure from existing practice under Article 344 TFEU. This may go some way towards explaining why so little is said about this provision in the Court's ruling.

In summary, there is an abundance of prior case law where arbitral tribunals have rejected arguments based on the incompatibility of intra-EU BITs with EU law and, what is more, have found that, far from being precluded from interpreting and applying EU law, they were both habilitated and obligated to do so. The manifest readiness of arbitral tribunal to extend the reach of their jurisdictional purview outside the four corners of the BITs may have spurred the counter-reaction from the EU institutions, which culminated with Achmea.

3.1.2 EU institutional practice

The Commission has established a practice of intervening in BIT arbitrations in support of the respondent-states' jurisdictional pleas by way of notes and *amicus curiae* briefs. At the outset, the tone and content of these were fairly diplomatic - but the language has gradually become more firm.[85]

By way of example[86], in a note submitted in the Eastern Sugar arbitration, the Commission contented itself to express its position that the intra-EU BITs were superseded by the EU Treaties and should be terminated.[87] The language in the Commission's note was so diplomatic that both parties argued that it supported their case.[88] In contrast, in a note submitted to the arbitral tribunal hearing the Achmea-case, the Commission called intra EU-BITs an "anomaly" and took the clear position that they should not be applied.[89]

In June 2015, he Commission took the first concrete steps in its move to ban of ISDS under intra EU-BIT by enjoining Austria, the Netherlands, Romania, Sweden and Slovakia to rescind their intra-EU BITs. This initial step was followed up by a number of pilot infringement proceedings.[90]

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[84] *Ibid*., para. 63
[85] Boxun Yin and Lord (Peter) Goldsmith, "Chapter 14: Intra-EU BITs: Competence and Consequences" in Niel Kaplan and Michael J. Moser (eds.) "Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber", Amicorum Michael Pryles, © Kluwer Law International; Kluwer Law International 2018, pp. 221-222
[86] *Ibid.*, for a comparison of Eastern Sugar and Eureko
[87] Eastern Sugar, supra n. 62, para. 119
[88] *Ibid*., para. 120
[89] Eureco, supra n. 80, paras. 177 and 182
[90] Fecak, supra n. 1, p. 377

One example of the hardening of stance of the EU is the now- notorious case of Micula vs. Romania.[91] It was noted by AG Wathelet in his opinion on Achmea that the award in the Micula-case is the only known example of an arbitral tribunal having reached a decision which may have been in breach of EU law.[92]

By way of factual and procedural background, the Micula family (who were Swedish nationals of Romanian ascent) owned a number and food production companies which were implanted in Romania - owing largely to a very favorable taxation regime. The economic incentives adopted by the Romanian government had caused the Miculas to undertake to maintain their operations in Romania for a specific term. However, when these incentives were subsequently found to constitute illegal state aides under EU law, they were repealed as a prerequisite for Romania's accession to the EU.

Following the roll-back of the favorable taxation regime, the Miculas brought a substantial damages claim against the Romanian government under the Sweden-Romania BIT. The proceedings were conducted under the ICSID Rules. The Miculas prevailed on jurisdiction and merits. However the EU Commission considered that the award was incompatible with EU law because the arbitral tribunal's granting of damages amounted to an indirect state aid. The Commission therefore compelled Romania to refrain from paying the awarded damages and held that the Miculas should repay any sums already received under the award.[93]

Concurrently, Romania attempted to have the award set aside before an ICSID *ad hoc* committee but this motion was rejected by decision of 26 February 2016. As such the award and Romania's payment obligations hereunder stand. At their end, the Micula-family has opposed the Commission's Final Decision and the proceedings are currently pending before the CJEU.

In parallel to the infringement proceedings, the Commission has diligently opposed all of the Miculas' attempts at having the award enforced in different jurisdictions. The most recent development reported is a decision by a Belgian court of 12 March 2019 to stay the enforcement proceedings undertaken by the Micula-family and to refer the matter to CJEU for a preliminary ruling regarding

[91] Ioan Micula *et al*. v. Romania, supra n. 71; For a complete account of the procedural history and commentary on the Micula case, see Stephan Wilske and Chloë Edworthy, "The Future of Intra-European Union BITs: A Recent Development in International Investment Treaty Arbitration against Romania and its Potential Collateral Damage", Journal of International Arbitration, 2016, Volume 33 Issue 4, pp. 337-343

[92] Opinion of AG Wathelet, supra n. 61, para. 45

[93] Commission's Decision (EU) of 30 March 2015 on state aid (2015/1470), dispositive section, Articles 1 and 2

the potential conflict between the EU Commission's prohibition to pay the damages under the award and Belgium's international obligations under the ICSID Convention and the BIT.[94]

The outcome of these proceedings is pending, however, in view of the CJEU's ruling in Achmea, matters are not looking too promising for the Miculas.

3.2. Achmea

3.2.2. Facts and procedural background[95]

The Achmea judgment follows a request for a preliminary ruling lodged by the German courts on 23 May 2016. The question was phrased in the following manner:

> *(1) Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called BIT internal to the European Union) under which an investor of a contracting State, in the event of a dispute concerning investments in the other contracting State, may bring proceedings against the latter State before an arbitration tribunal, where the investment protection agreement was concluded before one of the contracting States acceded to the European Union but the arbitration proceedings are not to be brought until after that date?*
>
> *If Question 1 is to be answered in the negative:*
>
> *(2) Does Article 267 TFEU preclude the application of such a provision?*
>
> *If Questions 1 and 2 are to be answered in the negative*
>
> *(3) Does the first paragraph of Article 18 FTEU preclude the application of such a provision under the circumstances described in Question 1?*

This question of interpretation arose in the context of an action in annulment of a final award rendered on 7 December 2012 following arbitral proceedings conducted under the UNCITRAL arbitration rules and supervised by the Permanent Court of Arbitration. The place of arbitration, fixed by the arbitral tribunal, was Frankfurt, Germany. The investor (Achmea, formerly "Eureko") was a company belonging to a Dutch insurance group, which had incorporated a subsidiary in Slovakia in the wake of the liberalisation of the private insurance sector in 2004. Achmea claimed that it had been adversely affected by the reversal of the liberal regulation following a change of governance in 2006, which entailed significant losses for Achmea. As a consequence of the curtailment of its operations in

[94] Tom Jones and Sebastian Perry, "Belgian court seeks guidance from ECJ on Micula award" in Global Arbitration Review of 28 March 2019

[95] For the factual and procedural history see Achmea, paras. 2-12 and the Opinion of AG Wathelet, Sections III and IV

Slovakia, Achmea initiated arbitration proceedings against the government under Article 8 of the Netherlands-Slovakia BIT, seeking damages in the amount of EUR 65 million.

In response, the Government raised a jurisdictional objection, arguing, firstly, that the TFEU and the Netherlands-Slovakia BIT had a substantive overlap and that the BIT should be considered either as inapplicable or to have been terminated in accordance with Articles 30 and 59 of the VCLT. The government moreover argued that the arbitration clause set forth at Article 8(2) of the BIT was inoperative or invalid because it was incompatible with the TFEU seeing as CJEU has exclusive jurisdiction in relation to the claims. This was because the alleged breach of the BIT would need to be assessed in light of the relevant provisions of EU law - namely the rules regulating the free movement of capital.

In a partial award dated 26 October 2010, the arbitral tribunal upheld its jurisdiction over Achmea's claims and, by final award dated 7 December 2012, the arbitral tribunal also found in favour of Achmea on the merits and awarded damages in the sum of EUR 22,1 million, together with interest and costs.

The Slovak Republic challenged the award before the Higher Regional Court of Frankfurt. In the setting-aside proceedings, the Slovak government argued that the award itself was contrary to German public policy and that the arbitration agreement was also null and void as contrary to public policy. In particular, the government argued that the arbitral tribunal constituted under Article 8(2) of the Netherlands-Slovakia BIT was not entitled to petition the CJEU for a preliminary ruling pursuant to Article 267 TFEU and may therefore have erred in the application of EU law provisions on the free movement of capital. As such, the dispute resolution mechanism foreseen under Article 8(2) of the BIT was contrary to Article 267 and 344 TFEU. Slovakia also referred to the principle of non-discrimination enshrined at Article 18 TFEU. The matter was dismissed in the first instance and the government therefore introduced an appeal before the German Federal Court of Justice. In the absence of persuasive domestic case law on the subject matter, the Federal Court of Justice decided to stay the proceedings and refer the question to the CJEU for a preliminary ruling.

3.2.3 Reasoning

In the case of Achmea, the CJEU and the Advocate General in charge of the instruction of the matter reached opposing conclusions, which is not an everyday occurrence. This sub-section examines the respective lines of reasoning of AG Wathelet and the Court in order to ascertain how - and why - they differ.

The Opinion of AG Wathelet

AG Wathelet examined the sequence of questions put to the CJEU in reversed order, starting with the question of the compatibility of Article 8 of the Netherlands-Slovakia BIT with **Article 18 TFEU**, which prohibits discrimination on grounds of nationality.

In the view of the Slovak Republic and the Commission, the BIT's substantive provisions, including the dispute resolution mechanism, are discriminatory as they give preferential treatment to nationals of the Netherlands who have invested in the Slovak Republic compared to other EU investors.[96] In dismissing this contention, AG Wathelet noted, firstly, that Slovakia actually had concluded similar treaties with the majority of other Member States. Secondly, with reference to constant case law of the CJEU concerning intra-EU double taxation treaties, AG Wathelet concluded that "*there is no discrimination where a Member State does not afford the nationals of another Member States the treatment with it affords, by convention, to the nationals of a third Member State*".[97]

The issue of discrimination was never addressed in the final judgment of the Court.

With respect to **Article 267,** which sets out the procedure for preliminary questions to the CJEU, AG Whatelet, at paragraph 85, gives the following justification for treating this question before Question 1:

> "*I am examining this question before the first question, because I consider that an arbitral tribunal constituted in accordance with Article 8 of the BIT is a court or tribunal within the meaning of Article 267 TFE, common to two Member States, namely the Kingdom of the Netherlands and the Slovak Republic, and is therefore permitted to request the Court to give a preliminary ruling. That automatically means that there is no incompatibility with Article 344 FTEU, which forms the subject matter of the first question*". (Emphasis added).

In order to arrive at this conclusion, AG Wathelet engages in a detailed four-pronged analysis of Article 8 of the BIT based on criteria for 'what constitutes a "court or tribunal"' derived from the CJEU's prior case law. These are listed at paragraph 86 of the opinion and treated in turn:

> "*According to settled case law, in order for a judicial body to be a "court or tribunal" for the purpose of Article 267 TFEU, it is necessary to take a number of factors into account, such as "whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it*

[96] Opinion of AG Wathelet, para. 60
[97] *Ibid.*, paras. 66-71

applies rules of law and whether it is independent. In addition, a "case [must be] called upon to give judgment in proceedings intended to lead to decisions of a judicial nature".

i. Whether the arbitral tribunals constituted in accordance with Article 8 of the BIT are established by law

As to the first criterion, AG Wathelet argues, quite simply, that it is indisputable that the arbitral tribunals constituted under the BIT are established in accordance with the law as they derive their jurisdiction both from the BIT itself as well as the statutes ratifying the BIT in the domestic legal orders. [98]

ii. Whether the arbitral tribunals constituted in accordance with Article 8 of the BIT are permanent

AG Wathelet considers that the criterion of permanence is also fulfilled.[99] AG Whatelet's reasoning in this regard primarily turns on the "institutionalisation" of the ISDS mechanism by virtue of the BIT and the ratification statutes. AG Wathelet also refers to other expressions of this "institutionalisation", *e.g.*, the facts that the BIT vests the Stockholm Chamber of Commerce, which is a "permanent arbitral institution", with the power to appoint arbitrators under the BIT and, moreover, that the UNCITRAL Rules apply to the arbitral proceedings which, furthermore, took place under the auspices of a permanent arbitral institution.[100]

As noted by one commentator, these arguments are not particularly persuasive.[101] Firstly, Article 8 of the BIT also provides for a method of constitution of the arbitral tribunal which does not require any institutional intervention (the parties each designate a co-arbitrator who must in turn select the third, presiding arbitrator[102]). Secondly, in any event, each arbitral tribunal constituted under Article 8 of the BIT will be composed of different individuals. AG Wathelet may well have done better in simply conceding that this criterion may not be fully satisfied and instead have stressed that that the conditions listed at paragraph 86 of the opinion, in any event, are not cumulative but merely a series of factors which the CJEU may take into account when assessing whether a decision making body constitutes a "court or tribunal" for the purpose of Article 267 TFEU.

[98] *Ibid.*, para. 96
[99] *Ibid.*, para. 109
[100] *Ibid.*, paras. 106-108
[101] Julien Berger, "Intra-EU Investor-State Arbitration: The Uncertainty Continues - Unpacking the Advocate General's Opinion in Case C-284/16 (Achmea)" in Jörg Risse, Günter Pickrahn *et al.* (eds.), SchiedsVZ - German Arbitration Journal, Vol 15, Issue 6, p. 285
[102] Netherlands-Slovakia BIT, Article 8(3)

iii. Whether the jurisdiction of the arbitral tribunals constituted in accordance with Article 8 of the BIT is compulsory

As to the third condition, AG Wathelet notes that the jurisdiction of the arbitral tribunals constituted under Article 8 of the BIT is compulsory pursuant both to Article 8(7) of the BIT, which stipulates that awards are final and binding upon the parties to the dispute, as well as Article 8(2) of the BIT whereby the signatory states consent to submit to any arbitration brought by investors from the other state. To AG Wathelets, that the fact that investors may decide to pursue their claims before the ordinary courts rather than through international arbitration does not modify the compulsory nature of the arbitral tribunal's jurisdiction insofar as the state is concerned.[103]

iv. Whether the procedure before the arbitral tribunals constituted in accordance with Article 8 of the BIT is *inter partes*, whether they apply rules of law in the settlement of the disputes before them and whether the arbitrators are independent and impartial

With reference to the procedural guarantees and principles set out at Article 8 of the BIT itself and in the UNCITAL Rules, AG Whatelet concludes that the conditions of *inter partes* proceedings and the application of "rules of law" are also fulfilled in the case at hand. AG Whatelet moreover notes that the UNCITRAL Rules specifically guarantee the independence and impartiality of the arbitrators appointed under the BIT by placing them under a strict obligation to disclose to the parties any circumstances that may be of a nature to call into question their independence and impartiality, and by allowing the parties to challenge arbitrators when such circumstances occur.[104]

Notwithstanding the conclusion reached in relation to Article 267 TFEU, AG Wathelet also analyses Question 1 concerning **Article 344 TFEU**.[105] In so doing, AG Whatelet conducts a three-step analysis, as set out below:

i. Does a dispute between an investor and a member state, such as that referred to in Article 8 of the BIT, come under Article 344 TFEU?

The starting point of the AG's analysis, is that Article 344 TFEU sets forth an obligation incumbent on the Member States to have recourse to the EU judicial system and to respect the exclusive

[103] Opinion of AG Wathelet, paras. 110-119
[104] *Ibid.*, paras. 120-125; See also Articles 11-13 of the UNCITRAL Rules (as revised in 2010 and 2013)
[105] *Ibid.*, para. 132

competence of the CJEU.[106] The question which arises is therefore whether disputes brought by a private investor against a Member State might nonetheless fall within the remit of Article 344 TFEU.

According to AG Wathelet, this question must be answered in the negative because nothing in the prior case law of the CJEU supports the contention that disputes between private entities and Member States fall under Article 344 TFEU.[107] On the contrary, the Court has on several occasions taken the opposite view, for instance with respect to the Agreement of the European and Community Patents Court (referred to above)[108] and also in the opinion issued prior to the EU's accession to the European Convention on Human Rights.[109] AG Wathelet plainly rejects the argument, advanced by the Commission in the course of the proceedings, that disputes between an investor and a Member State is analogous to disputes between Member States because the investor is seeking to further a right conferred onto the state by virtue of the BIT. AG Wathelet, in this respect, notes that it is an established principle under international law that treaties may confer rights directly onto individuals. Indeed, this is the case of the EU Treaties themselves - as well as BITs - as recognised by a vast body of case law.[110]

ii. Does the dispute at issue "[concern] the interpretation or application of the Treaties?"

With reference to the comments made by the referring court, AG Wathelet notes that it is common ground that an infringement of Article 344 TFEU occurs only where the object of the arbitral award in question is the interpretation and/or application of EU law provisions. Accordingly, what needs to be determined is whether this was the case in Achmea.[111]

To AG Wathelet, this is not so because the EU is not a party to the Netherlands-Slovakia BIT, which consequently does not form part of the EU legal order. Accordingly, the exclusive competence of the CJEU, enshrined at Article 344 TFEU, is not affected by the arbitral tribunal's jurisdiction to hear disputes concerning breaches of the BIT.[112] Indeed, according to AG Wathelet, the circumstance that EU law forms part of the law applicable to disputes between investors and States does not entail that such disputes directly concern the interpretation and application of EU law. This is because, firstly,

[106] *Ibid.*, para. 142
[107] *Ibid.*, para. 146
[108] *Ibid.*, para. 147
[109] *Ibid.*, paras. 151-152
[110] *Ibid.*, paras. 154-156
[111] *Ibid.*, paras. 160-161
[112] *Ibid.*, paras. 167-168

the jurisdiction of the arbitral tribunal is confined to alleged breaches of the BIT itself and EU law is merely one factor amongst others to take into account when determining whether a breach has occurred and, secondly, the scope of the BIT and the legal rules which it introduces are not the same as those of the TEU and TFEU. In other words, the guarantees and protections afforded under the BIT do not "reproduce nor contradict" those existing under EU law and while there may be a substantive overlap between some of the rules contained in the BIT, the EU Treaties and the EU Charter of Rights, they do not result in incompatible outcomes when applied concurrently.[113] In taking this position, the AG appears to have been inspired by international arbitration case law.

iii. Does the Netherlands-Czechoslovakia BIT have the effect of undermining the allocation of powers fixed by the EU and the FEU Treaties and, therefore, the autonomy of the EU legal system?

Referring to the principle laid down in the decisions of Van Gend & Loos and ENEL (referred to above) AG Wathelet recalls the EU's constitutional principles of autonomy, supremacy and direct effect. [114] The AG also affirms that the mechanism of preliminary questions is the cornerstone of the judicial system implemented in order to safeguard these fundamental principles.[115] However, to AG Wathelet's mind, the mechanism of judicial dialogue between the CJEU and the domestic courts is not undermined by Article 8 of the BIT.[116] According to AG Wathelet, this would be the case even if the CJEU were to decide that arbitral tribunals do not qualify as "courts or tribunals" in the sense of Article 267 TFEU.[117] AG Wathelet advances three main-grounds for this conclusion, reasoning in generic, hypothetical and specific terms:

Reasoning in general terms, AG Wathelet notes that arbitral awards, albeit generally exempted from appeal as to their substance, do not escape scrutiny of the state courts altogether. Under the New York Convention, which all of the EU Member States have acceded to, a state court seized of an action to enforce an award against a recalcitrant losing party must deny enforcement for the reasons listed at Article V of the Convention. These reasons include, *i.a.*, non-compliance with public policy rules in

[113] *Ibid.*, paras. 173-228
[114] *Ibid.*, para. 231
[115] *Ibid.*, para. 234-235
[116] *Ibid.*, para. 256
[117] *Ibid.*, para. 237

the state where enforcement is sought.[118] According to the constant case law of the CJEU, such public policy rules also includes fundamental EU norms.[119]

Under Article 267 TFEU, national courts must therefore refer to the CJEU any issue of interpretation or application of EU law arising in the context of enforcement proceedings (as they would in other types of proceedings).[120] The same would be the case in the event of a challenge against an award brought at the seat of arbitration on one of the grounds recognised under the law applicable at the seat of the arbitration, including infringements of public policy rules derived from EU law.[121]

AG Wathelet dismissed the, in his view ***hypothetical***, concern voiced by the Commission that the seat of arbitration could be fixed in the territory of a non-Member State (meaning that annulment proceedings against the award, if any, would take place in a third country) or that recognition and enforcement of an award rendered under the BIT could be attempted in a third-country outside the EU (in which case the domestic courts and the CJEU would not be able to exercise any control over the process either).[122] According to the Commission, the former would always be the case where the BIT or the parties designate the ICSID as the administering arbitral institution because, pursuant to the express wording of the ISCID Convention, an ICSID award is impermeable to any recourse or remedy outside the four corners of the Convention. As such, there would be no scope for the domestic courts to exercise any scrutiny of the conformity of the award with EU law in the context of annulment proceedings.[123]

Whilst conceding that the EU Member States should refrain from including ICSID as one of the potential dispute resolution fora in intra-EU BITs,[124] AG Wathelet notes (albeit in a footnote) that this concern has nevertheless not prevented the EU from designating ICSID as the arbitral institution in the draft FTAs between EU and Singapore.[125]

As noted by Julien Berger in his commentary to the AG's opinion, it is too simplistic to dismiss the Commission's concerns that EU Member States could designate a legal seat outside the EU as purely hypothetical.[126] There can be many reasons why parties might select a seat in a third jurisdiction, for

[118] New York Convention, Article V(2)(a).
[119] Eco Swiss, supra n. 40, para. 32
[120] Opinion of AG Wathelet, paras. 239-244
[121] *Ibid.*, para. 250
[122] *Ibid.*, para. 251
[123] *Ibid.*, para. 252; see ICSID Convention Articles 52 and 53.1
[124] *Ibid.*, para. 253
[125] *Ibid.*, footnote 199; The CETA also contains a number of references to ICSID
[126] Berger, supra. note 101, p. 286

example if the arbitrators are based in such third jurisdiction or simply in order to have at truly neutral venue. Achmea may operate as an incentive to have the seat outside the EU as a means of circumventing the effects of the decision.

Finally according to AG Wathelet, in instances where a Member State complies with an award in contravention of EU law, the Commission would be at liberty to bring an infringement action pursuant to Articles 258 and 260 TFEU.[127] Arguably, this is one of the weaker points in AG Wathelet's demonstration. The attempt to cure a breach of EU law by compelling a Member State to breach its obligations under international law (by not paying out an award that it believes is contrary to EU law) would likely result in outcomes similar to the Micula-saga or, in a worst case scenario, in an action by the investor's home-state before the International Court of Justice.

Regarding the specific case at hand, AG Wathelet notes that proceedings under the Netherlands-Slovakia BIT, effectively, allow for the preservation of EU norms.

Under Article 8 of the BIT, the proceedings are to be conducted under the UNCITRAL Arbitration Rules which, in turn, vest the arbitral tribunal with the authority to determine the legal seat of arbitration and selecting an institution to act as registry, upon consultation with the parties.[128] As in the present instance, the arbitral tribunal fixed Frankfurt as the seat of the arbitration, the proceedings became subject to the procedural law of Germany and, in particular, Article 1059 of the German Code of Civil Procedure on the setting-aside of arbitral awards.[129] It was precisely in the context of an action under Article 1059 that the German court made a referral to the CJEU in the matter at hand. The same remedy would have been available to the German courts had the issue concerned a matter regarding substantive EU law rather than one of a procedural nature.

On the balance of the above analysis, AG Wathelet recommended that the CJEU hold the dispute resolution mechanism set out at Article 8 of the Netherlands-Slovenia BIT to be compatible with EU law.

The decision of the CJEU

In contrast with the lengthy and carefully reasoned opinion of AG Wathelet, the dispositive section of the Court's judgment and the supporting reasoning are remarkably brief. The decision barely makes any reference to the Opinion delivered by AG Wathelet, which it mentions only in passing under a

[127] Opinion of AG Wathelet, para. 255
[128] *Ibid.*, para. 246
[129] *Ibid*., para.247

procedural point, stressing that, in any event, the Court is not bound by the AG's conclusions or the underlying reasoning.[130]

The approach of the CJEU differs significantly from that of its AG in several respects. Contrary to AG Wathelet, the CJEU treats the three questions in the order in which they were presented by the referring court. The Court, however, decides to analyse Articles 267 and 344 TFEU together while focusing its attention squarely on Article 267 TFEU and treating Article 344 TFEU merely as a supportive source of the principle of the Court's exclusive competence to interpret EU law. This approach enables the Court to brush over the impediment to the application of that provision identified by AG Wathelet and the referring court (*i.e.*, that the addressees are the Member States and not private entities).

Following a summary of the procedural background, applicable rules and the comments received from the referring court, the CJEU declares that the starting point of its analysis is that Articles 267 and 344 TFEU, jointly, enshrine the principle according to which:

> *"an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court."*[131]

The Court then proceeds to recall the fundamental principles on which the EU constitutional order is based (autonomy, direct effect and primacy).[132] Having laid out these overarching principles of EU law, the Court proceeds to apply a three-step test in order to determine whether Article 8 of the Netherlands-Slovakia BIT has an adverse effect on the EU constitutional order:

The first step consists in ascertaining whether the disputes, which arbitral tribunals constituted under the BIT might be called upon to resolve, relate to the interpretation or application of EU law. Contrary to the view expressed by AG Wathelet, the CJEU answers this question in the affirmative, stating that, even if it could be argued (as indeed it had been by Achmea) that the arbitral tribunal is only competent to decide on possible breaches of the BIT, under Article 8(6) of the BIT itself, the arbitral tribunal must do so by reference to the law in force in the territory of the contracting party concerned and other relevant agreements between the contracting parties, including in the case at hand EU law provisions protecting the freedom of establishment and the free movement of capital.[133]

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[130] Achmea, para. 27
[131] *Ibid.*, para. 32
[132] *Ibid.*, para. 33
[133] *Ibid.*, paras. 40-42

The second steps is for the Court to determine whether an arbitral tribunal constituted under Article 8 of the BIT can be regarded as a "court or tribunal" within the meaning of Article 267 TFEU and, as such, may refer preliminary questions to the CJEU.[134] While conceding that the Court has in the past held, *i.a.*, with respect to the Benelux Court of Justice, that there is no good reason why a court common to a number of Member States should not be considered as a "court or tribunal" in the sense of Article 267 TFEU, the CJEU distinguishes that situation from the situation at hand on the basis of the deliberate detachment of the arbitral procedure from the judicial system of the Member States:

> *"In the case in the main proceedings, the arbitral tribunal is not part of the judicial system of the Netherland or Slovakia. Indeed it is precisely the exceptional nature of the tribunal's jurisdiction with that of the courts of those two Member States that is one of the principal reasons for the existence of Article 8 of the BIT.*
>
> *The characteristics of the arbitral tribunal at issue in the main proceedings means that it cannot in any event be classified as a court or tribunal 'of a Member State' within the meaning of Article 267 TFEU."*[135]

In this respect, both the analysis and conclusion reached by the CJEU diverge significantly from the those of AG Whatelet, who at the end of a detailed demonstration, comprising all of the criteria stated at paragraph 86 of his opinion, arrives at the conclusion that arbitral tribunals established under Article 8 of the BIT should be treated as "courts and tribunals" for the purpose of Article 267 TFEU. Conversely, the Court confines itself to stating that arbitral tribunals constituted under Article 8 of the BIT are not "courts or tribunals" owing to their detachment from - and independence of - the judicial system of the Member States. In this, the CJEU is consistent with its previous case law. Since its 1982 decision in the Nordsee-case,[136] the Court has denied arbitral tribunals the possibility of referring preliminary questions under Article 267 TFEU. In Nordsee, the Court, in a similar fashion, affirmed that there must be a sufficient linkage between the arbitration procedure and the court system in order to confer the status of a "court or tribunal of a Member State" to an arbitral tribunal.[137]

The third step of the test performed by the CJEU is ascertaining whether awards rendered under the BIT are subject to review by the courts of a Member State.[138] The Court took the view that they are not, firstly, because such arbitral awards are, by their nature, final and binding[139] and, secondly,

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[134] *Ibid.*, para. 43
[135] *Ibid.*, paras. 45-47
[136] Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG., 23 March 1982, Case 102/81 [ECLI:EU:C:1982:107]
[137] *Ibid.*, paras. 10-13
[138] *Ibid.*, para. 50
[139] Netherlands-Slovakia BIT, Article 8(7)

because, the arbitral tribunal is at liberty to lay down its own procedures, subject to the UNCITRAL Rules, and may therefore "*choose its seat and consequently the law applicable to the procedure governing judicial review of the validity of the award by which it puts an end to the dispute before it*".[140]

Arguably, the above findings are equally applicable to "regular" commercial arbitration. However, the Court took great care to expressly distinguish the ISDS-mechanism in intra EU-BITs from commercial arbitration:

> *"[i]t is true, in relation to commercial arbitration, the Court has held that the requirements of efficient arbitration proceedings justify the review of arbitral awards by the courts of the Member States being limited in scope, provided that the fundamental provisions of EU law can be examined in the course of that review and, if necessary, be the subject of a reference to the Court for a preliminary ruling.*
>
> *(…)*
>
> *However, arbitration proceedings such as those referred to in Article 8 of the BIT are different from commercial arbitration proceedings. While the latter originate in the freely expressed wishes of the parties, the former derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU required them to establish in the field covered by EU law. […] In those circumstances, the considerations set out in the preceding paragraph relating to commercial arbitration cannot be applied to arbitration proceedings such as those referred to in Article 8 of the BIT."* [141](Emphasis added).

The CJEU distinguishes commercial arbitration from investment arbitration on grounds that, while the former is an expression of party-autonomy (*i.e.*, the contractual freedom of private entities) the latter stems from the will of two sovereign states to remove certain disputes from the purview of the national courts and, as a consequence, the control exercised by the CJEU.

This finding, together with the finding that arbitral tribunal are not "courts or tribunals of a Member State" in the sense of Article 267 TFEU, is fatal to the dispute resolution mechanism in the Netherlands-Slovakia BIT - and to ISDS clauses in all other intra-EU BITs. Nevertheless, as explained in more detail below, this *dictum* has actually provided a foothold one national court to to uphold a post-Achmea award rendered under intra-EU BITs.

[140] Achmea, para. 51
[141] *Ibid.*, paras. 54-55

3.3 Assessment and perspectives

3.3.1 Preliminary remarks

Despite - or perhaps because of - its brevity, the Court's reasoning in Achmea raises more questions than it answers. For example, the CJEU is silent as to how the scope of Article 344 TFEU, which is designed to apply to Member States only, is extended to comprise disputes involving a Member State and a private entity. The Court does not expand on its grounds for deviating from previous practice and case law concerning this provision either. The basis on which the Court distinguished commercial arbitration and ISDS in relation to Article 267 TFEU is also unclear.

The consequences of the lack of clarity of the CJEU as to the meaning and scope of the Achmea judgment will be the object of sub-section 3.3.2. The following sub-section (3.3.3.) will address the substantive and, in particular, procedural void left by Achmea. This will be the object of sub-section 3.3.3.

3.3.2 Uncertainty as to scope

Commercial arbitration

Although the CJEU deliberately carved out commercial arbitration from the scope of the decision,[142] the decision handed down in Achmea has spawned speculations about its possible implications for the future of commercial arbitration.[143] As noted by one commentator, "*[t]he effect of the international commercial arbitration legal framework, and related national measures by EU member states, appears virtually indistinguishable from the effect of the arbitration provisions contained in the impugned intra-EU BIT*."[144] In other words, the points and presumptions made by the CJEU regarding the nature of ISDS are equally true of commercial arbitration - and *vice versa* - for example:

- Party-autonomy vs. detachment from the state judicial system: The CJEU posits that the characteristics setting ISDS apart from commercial arbitration is that that the latter originates in the parties' mutual consent to submit a dispute (future or present) to an arbitral tribunal, whereas the former is an expression of the will of two sovereign states to withdraw certain disputes from the supervision of the national courts. This analysis is problematic because the dispute resolution provisions in BITs are framed as open offers to investors to submit disputes

[142] *Ibid.*, paras. 54-55
[143] Lavranos & Singla, supra n. 9. p. 356
[144] John Gaffney, "Achmea and commercial arbitration" in Global Arbitration Review of 29 April 2019

to arbitration.[145] The "meeting of the minds" only occurs when an investor decides to refer a dispute to arbitration;[146] accordingly, party-autonomy is a bearing element in both commercial - and investor-state arbitration. Moreover, as mentioned in the general introduction, one of the principal benefits of international arbitration, as opposed to litigation at the national court of either of the parties, is precisely the neutrality of the arbitral tribunal. This consideration applies to investment arbitration and commercial arbitration alike.

- Ability to submit preliminary questions to the Court: The conflict between the jurisdiction of arbitral tribunals constituted under a BIT and Article 267 TFEU arises, in part, because of the CJEU's refusal to recognise such adjudication bodies as "court and tribunals" in their own right, meaning that they cannot refer issues pertaining to the interpretation or application of EU law directly to the CJEU. This, however, also applies arbitral tribunals established under private contracts.

  In this connection, one cannot help but wonder why the Court shied away from the course suggested by AG Wathelet to recognise the status of arbitral tribunals as "courts or tribunals". Doing so would have paved the way for arbitral tribunals to refer preliminary questions directly to the CJEU, thus removing all of the grounds for banning dispute resolution mechanism in intra-EU BITs. The view that such status should be conferred to arbitral tribunals, *e.g.*, for reasons of increased legitimacy, coherence and procedural economy, has since Achmea been endorsed by some commentators.[147]

- Absence of judicial review: One of the other key-findings of the Court as to the nature of ISDS concerns the insufficient review exercised by the national courts of the conformity of awards with public policy provisions (which, pursuant to the Eco Swiss judgment, includes fundamental principles of EU law). It would appear that the Court considers that the requirements to this review is higher in relation to ISDS than for commercial arbitration on account of their difference of nature.

  It is important to bear in mind that, even in the context of commercial arbitration, there is no automatic judicial review of awards. National courts will not perform any scrutiny on their

[145] Fecak, supra. n. 1, p. 400
[146] *Ibid*., p. 401
[147] *E.g.*, de Boeck, supra n. 19, p. 238

own motion. Unless a party brings an action to enforce the award or to have it set aside there will be no judicial review of the award. Secondly, it should be noted, that such review is by no means excluded for awards rendered under a BIT - save where the arbitral proceedings have been conducted under the ICSID Convention. The ISCID Convention is a self-contained system, which explicitly reserves review for the ICSID itself - to the exclusion of all other courses of action.[148] As it was acknowledged by AG Wathelet, this is indeed problematic because there is no legal basis for an ICSID *ad hoc* committee seized of a challenge to an award to refer preliminary questions to the CJEU. However, seeing as the vast majority of BITs provide for several dispute resolution fora at the election of the investor, a less radical option available to the CJEU would have been to target only ICSID arbitration clauses, thus leaving the ISDS regime under intra-EU BITs, at least, partially intact.

It would seem that, for the time being, commercial arbitration, is not in immediate danger. This being said, the distinction operated by the CJEU between commercial - and investment arbitration is not very persuasive and it cannot be excluded that the Court will revisit the issue when an opportunity presents itself.[149]

The ECT

As noted by one author, an ISDS clause in an MIT to which two or more individual Member States are parties logically presents a similar potential for conflict with EU law as those of intra-EU BITs.[150] This is the case of the ECT, which represents a significant portion of all ISDS proceedings globally.[151]

The CJEU did not provide any clarification as to the impact of Achmea on intra-EU disputes under the ECT. The Court's silence in this respect may well be ascribed to several factors. Firstly, a significant number of ECT disputes are currently pending against Spain following the reversal of renewable energy incentives having caused great detriment to many foreign investors.[152] Secondly, the EU is itself a party to the ECT and played an active role in the coming into existence of the ECT.[153]These circumstances may have caused the CJEU to shy away from this issue which it, strictly

[148] Fecak, supra. n. 1, pp. 416-420
[149] Lavranos & Singla, supra n. 9, p. 356
[150] *Ibid*., p. 397 and p. 399
[151] United Nations Conference on Trade and Development (UNCTAD), Investor-State Dispute Settlement: Review of Developments in 2017, IIA Issue Note II of June 2018, p. 3
[152] UNCTAD Spain as respondent (accessible at: https://investmentpolicyhubold.unctad.org/ISDS/CountryCases/197?partyRole=2; accessed on 12 May 2019)
[153] Fecak, supra. n.1, p. 399

speaking, did not have to address. As described below, the Commission has subsequently declared that the ECT is covered by the Achmea judgment.

Since Achmea, at least three arbitral tribunals have had the opportunity to consider the conformity of the dispute resolution mechanism in the ECT with EU law. Interestingly, the solutions adopted by these tribunals do not significantly deviate from those found in pre-Achmea arbitration case law.[154]

The first matter was one of the solar energy cases currently faced by Spain. In the case of Masdar Solar (award of May 2018),[155] opposing Spain to a Dutch investor, the respondent-state raised a number of jurisdictional pleas. Spain, *i.a.*, specifically referred to the primacy of EU law - as enshrined at Article 334 TFEU - over the ECT.

Spain's arguments were summarised at paragraph 335 of the final award: Firstly, as the Netherlands and Spain were both members of the EU at the time of the conclusion of the ECT, they were precluded from concluding a treaty providing for an autonomous ISDS mechanism in relation to intra-EU investments. Further, it would be contrary to EU law to allow for the resolution by arbitration of disputes affecting the freedom of establishment and free movement of capital of an EU investor in EU territory in the field of renewable energy; if intra-EU disputes were to fall within the scope of the protection of the ECT, it would be necessary to assume that the EU and its Member States had encouraged the conclusion of the ECT to deal with intra-EU investments by way of a parallel ISDS - in contravention of the rules of the Internal Market as well as the principle of autonomy of EU law and the CJEU's monopoly on final interpretation.

These arguments were all dismissed by the arbitral tribunal which, with reference to past arbitration - and CJEU case law, found (i) that the scope of Article 344 TFEU could not be expanded to encompass disputes brought by private parties against a Member State; and (ii) not only was the arbitral tribunal vested with the power to interpret EU law when applying the ECT, it was under a positive obligation to do so.[156]

There may be several reasons why the arbitral tribunal did not pay any particular heed to Achmea, the most likely one being that Achmea was not referred to by the parties in the course of the written - or oral proceedings, making it virtually impossible for the arbitral tribunal to make any findings by explicit reference to the judgment without exceeding its mandate.

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[154] Lavranos & Singla, supra n. 9, p. 353
[155] Masdar Solar and Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, decision of 16 May 2018
[156] *Ibid.*, paras. 336 *et seq*.

The two subsequent cases are more interesting because in both those instances the respondent-states raised a specific Achmea-plea. In the decision rendered in the case of Vattenfall v. Germany[157] a couple of months after the Masdar Solar award, the German government requested that the arbitral tribunal decline jurisdiction as a direct consequence of Achmea.[158] The arbitral tribunal delivered a 74 pages-long award dedicated solely to the Achmea issue. In its decision, the arbitral tribunal adopted a restrictive reading of the Achmea ruling, despite the Commission's statements in its *amicus curiae* brief that ban on ISDS laid down in Achmea also applies to the ECT.

The arbitral tribunal upheld its jurisdiction, holding, *i.a.*, that it was not clear from the Achmea decision whether it was intended to encompass disputes under the ECT, and that it was not the arbitral tribunal's role to "extrapolate" from the Achmea judgment a rule which was not clearly stated therein.[159] The arbitral tribunal also noted that it would have been easy for the EU and the Member States to include a carve-out or "disconnection clause" in the ECT respecting ISDS but that no such clause existed, meaning that the parties to the ECT and their nationals had a legitimate expectation that all of the ECT's provisions, including the dispute resolution clause, would apply.[160] Additionally, the arbitral tribunal found that, pursuant to Article 16 of the ECT, a party cannot validly invoke another treaty to derogate from the ECT's investment protection scheme (and correlate dispute resolution system) insofar as the ECT is more favorable to the investors' rights.[161] Furthermore, the arbitral tribunal noted that depriving EU investors of their treaty-protected right to a direct recourse against an EU Member State would run counter to the purpose of the ECT to promote long term cooperation in the field of trade in energy.[162]

The decision delivered in the matter of Eskosol v. Italy (award of May 2019)[163] echoes the restrictive reading of Achmea proposed by in the Vattenfall decision, which it extensively refers to respecting, *e.g.*, the absence of a specific carve-out for intra-EU dispute in the ECT[164] and the impact of the aforementioned Article 16. In upholding its jurisdiction, the arbitral tribunal also took note of the silence of the CJEU with respect the implications of the Achmea judgment for the ECT

[157] Vattenfall AB *et al.* v. Federal Republic of Germany, ICSID Case No. ARB/12/12, decision on the Achmea issue of 31 August 2018
[158] *Ibid*., para. 1
[159] *Ibid*., paras. 161-164
[160] *Ibid*., paras. 172 *et seq.* and paras. 201 *et seq.*
[161] *Ibid*., paras.192 *et seq.*
[162] *Ibid*., para. 197
[163] Eskosol SpA in liquidazione v. Italian Republic, ICSID Case No ARB/15/50, decision on termination request dated 7 May 2019
[164] *Ibid*., paras. 91-93

notwithstanding the language of the referral from the German court and developments on this issue in AG Wathelet's observations.[165] Furthermore, the arbitral tribunal noted, *arguendo*, that even if the Achmea judgment did "reach" intra-EU disputes under the ECT, it would not, as a matter of international law, be capable of binding the arbitral tribunal[166] or invalidating the ECT[167] and/or the state-parties' pre-expressed consent to arbitrate.[168]

On the basis of the above decisions concerning the ECT, it would seem that a tendency to interpret Achmea restrictively is forming in international arbitration case law.

Intra-EU investment disputes

A similar narrow reading can be observed in the one reported instance of a national court having pronounced itself on the validity of an award under an intra-EU BIT post-Achmea. In a recent decision of 22 February 2019, the Svea Court of Appeal in Sweden upheld the validity of two awards rendered in an arbitration brought by an investor from Luxembourg, PL Holdings, against Poland under the 1991 Luxembourg-Poland BIT. The arbitration proceedings had been conducted pursuant to the Arbitration Rules of the Stockholm Chamber of Commerce, with Stockholm as the seat of the arbitration. The dispute arose out of the expropriation of the Claimant's shares in a Polish bank.[169]

Poland's argument in the setting-aside proceedings were based directly on the Achmea judgment. Poland argued, *i.a.*, that by virtue of the Achmea judgment, there was no valid consent to arbitrate because the matter was "inarbitrable" (seeing as intra-EU investment disputes may not be arbitrated under Articles 267 and 344 FEU) and/or the award itself was manifestly incompatible with public policy principles (including fundamental principles of EU law) and must therefore be set aside.[170]

Poland had also availed itself of an EU law-defense during the arbitration - but not until the submission of its rejoinder. For this reason, the arbitral tribunal found that Poland's objections were in principle time-barred but decided to consider them nonetheless in view of the importance of questions at stake.[171] The arbitral tribunal rejected Poland's jurisdictional pleas, finding, *i.a.*, that there was no incompatibility between the BIT and EU[172] and that Poland's EU law arguments under Article

[165] *Ibid*., paras. 98-102
[166] *Ibid*., para. 186
[167] *Ibid*., para. 187
[168] *Ibid*., para. 199 *et seq*.
[169] Svea Court of Appeal, division 02, 22 February 2019, Poland v. PL Holdings S.a.r.l., ref. T-8538-17 and T-12033-17
[170] *Ibid*., grounds A1 and A2 for the challenge
[171] PL Holdings S.à.r.l . v. Republic of Poland, SCC Arb. No. V 2014/163, Partial Award of 28 June 2017, paras. 306-307
[172] *Ibid*., para. 311

344 TFEU could not prevail because the provision did not apply to cases involving a Member State and an investor.[173]

Poland's challenge to the award was also eventually rejected by the Svea Court of Appeal, which did not even deem it necessary to defer to the CJEU for a preliminary ruling.[174]

The Svea Court of Appeal identified, within the reasoning of the CJEU, a "loop-hole" allowing it to uphold the award. As explained by two of the counsel arguing the case before the Svea Court of Appeal, the reasoning of the Swedish court revolves around the distinction between commercial - and investment arbitration drawn by the CJEU in Achmea - the former being an expression of party-autonomy and the latter of the will of two sovereign states to remove certain disputes, potentially involving elements of EU law, from the scrutiny of the state courts.[175] According to the court, this distinction meant that arbitration agreements in BITs are invalid between Member States. However, this would not preclude a Member State and an investor from concluding a valid arbitration agreement, *e.g.*, by the investor bringing a claim against the state and the state tacitly accepting to submit to arbitration by failing to object in a timely manner.[176]

On this basis, the Court distinguished the dispute before it from the situation in Achmea on account, *i.a.*, of the timeliness of the jurisdictional objections of Slovakia and the belatedness of those submitted by Poland.[177] The Svea Court of Appeal found that Poland's failure to object to the jurisdiction of the arbitral tribunal until the proceedings were at an advanced stage amounted to a waiver under the Swedish Arbitration Act and the procedural rules designated by the parties.[178] Consequently, the referral of the dispute to the arbitral tribunal could be considered an expression of party-autonomy.

In such circumstances, there is no contradiction between the BIT and EU law, provided also that the final award can be made subject to the mechanism of limited judicial review performed by the state courts who may, where appropriate, petition the CJEU for a preliminary ruling.[179] This was the case in the matter at hand because the seat of the arbitration was in Sweden and, as such, the award was

[173] *Ibid.*, para. 314
[174] PL Holdings - Svea Court of Appeal, supra n. 169, p. 57; See also PL Holdings - Partial Award, supra n. 171, paras. 276 *et seq*. and para. 306
[175] Stephen Fietta and Robin Oldenstam, "Why the Swedish court decision in PL Holdings is consistent with Achmea" in Global arbitration Review of 29 April 2019; see Achmea, para. 55
[176] PL Holdings - Svea Court of Appeal, supra n. 169, p. 42-43
[177] *Ibid*., p. 41; See also Fietta & Oldenstam, supra n. 175, under the heading "The Svea court's assesment of Achmea"
[178] PL Holdings - Svea Court of Appeal, supra n. 169, pp. 54-56
[179] *Ibid.*, p. 43

subject to the review by the Swedish courts. The court of appeal went on to dismiss Poland's contention that the subject-matter was incapable of being settled by arbitration.[180] The appellate court recalled the high threshold under Swedish law for annulling an award on public policy grounds[181] and noted that the circumstances referred to by Poland were not of a nature to warrant the setting-aside.

Although the Svea Court of Appeal appears to have found, within the Achmea decision itself, a temporary foothold to circumvent the CJEU's ruling, it must be expected that, going forward, states will present their Achmea-pleas at the initial stages of the proceedings so as to avoid such preclusion.

As such, the decision only provides a limited remedy for the substantive and procedural gap in the protection of investors' rights left by Achmea.

3.3.3 The "gap" in the protection of rights

As mentioned in the foregoing, there is some overlap - but not identity - between intra-EU BITs and the EU Treaties in terms of their overall purpose, as well as certain of the material rights granted to investors. However, as noted by one commentator, BITs aim to provide extensive substantive protections to investors once an investment has been made, while the EU simply aims at removing obstacles to cross border cash-flows.[182] In other words, the substantive guarantees afforded to investors under BITs extend further than those available under EU law.

One of the key-difference between BITs and the EU Treaties is the availability of a direct course of action permitting investors to have disputes with the host-state adjudicated by an independent body rather than relying solely on the state courts. The "deactivation" of the dispute resolution mechanism in intra-EU BITs thus voids the entire protective scheme of its interest. Furthermore, once the Member State finalise negotiations to terminate their intra EU-BITs, the material protections will also, eventually, fall away.

This constitutes a problem, not only for investors already operating in the EU and whose legitimate expectation will be disappointed,[183]but also *vis-à-vis* prospective investors who may be deterred from placing an investment in another Member State or might attempt to circumvent the Achmea-decision by channeling their investments through special purpose corporate vehicles in third " countries.[184] For

[180] *Ibid*., p. 45
[181] *Ibid*., p. 36
[182] Eilmansberger, supra n. 57, p. 519
[183] "ASA Board Message", supra. n. 10, p. 555
[184] *Ibid*., p. 556

these reasons, and considering that several less radical solutions were available to the CJEU, it is regrettable that the Court opted for what, in essence, amounts to a full ban of intra-EU ISDS.

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The decision reached in Achmea must be read in light of the EU's broader policy goals. Over several years, the EU has pursued a mission to do away with the traditional *ad hoc* ISDS scheme in order to implement a fully institutionalized, global system with tenured judges etc. The road map for achieving this objective was laid out in the Commission's Concept Paper entitled "Investment in TTIP and beyond - the path to reform; Enhancing the right to regulate and moving from the current ad hoc arbitration towards an Investment Court" dated 5 May 2015 prepared by EU trade commissioner Cecilia Malmström.

In the Concept Paper, it was noted that the conferral of the exclusive competence to the EU in the field of foreign direct investments with the Lisbon Treaty[185] represented an opportunity for the EU to undertake a "profound reform" of the traditional ISDS scheme. This would happen, *i.a.*, through the incorporation of an innovative ISDS mechanism in the new generation of FTAs.[186] The principal features of the ISDS system contemplated for the new generation of FTA were set out at page 4 of the Concept Paper:

> *"They contain new proposals on the functioning of the ISDR system. They suggest steps that can be taken to transform the system towards one which functions more like a traditional courts systems, by making their appointments to serve as arbitrators permanent, to move towards assimilating their qualifications to those of national judges, and to introduce an appeal system.*
>
> *(...) in parallel the EU should work towards the establishment of an international investment court an appellate mechanism with tenures judges with the vocation to replace the bilateral mechanism which would be established".*

As explained in more detail below, it is far from certain that investors (from third countries and Member States alike) will be in a better position if the projected ISDS system is implemented in its current form. Tellingly, according to the Concept Paper, one of the overriding principles of the new generation of FTAs is that governments should retain the "ultimate control" over the interpretation of the rules set forth in these agreements.[187]

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[185] See Articles 3(1)(e) and 207(1) of the TFEU
[186] Concept Paper of May 2015, "Investment in TTIP and beyond - the path to reform; Enhancing the right to regulate and moving from the current ad hoc arbitration towards an Investment Court", p. 1
[187] *Ibid*., p. 2 (2nd bullet point from the bottom of the page)

4. ISDS developments in the EU's foreign affairs

Around the time of the signing and entry into force of the Lisbon Treaty, the EU's growing opposition to ISDS started solidifying in concrete institutional action. The EU also started taking steps towards the implementation of a new ISDS system in a series of FTAs currently under negotiation between the EU and its most significant trading partners.[188] To date, only the CETA has been signed[189] and applies provisionally to certain aspects of the trade relations between Canada and the EU.[190]

Section 4.1 below will briefly set out the characteristics of the dispute resolution system contemplated under the CETA and address the potential conflict between the ISDS mechanism in the CETA and EU law, in view of the Achmea judgment.

In Section 4.2, the future of the IRDR system and namely the prospect of a multinational investment court will be treated. Section 4.2 will also provide an assessment of the aptness of the ISDS system envisaged to safeguard investors' rights at a level equivalent to the current *ad hoc* system under BITs.

4.1 The new generation of FTAs

As the CETA is expected to be the first of the new FTAs to enter (fully) into force, and may be considered as a form of pilot agreement, the focus will be on the CETA in the following sub-sections. The EU's FTAs with Singapore and Vietnam, which are at an advanced stage of the negating process, also contain provisions for a permanent investment tribunal.[191]

4.1.1 The contemplated ISDS mechanism in the CETA

The ISDS mechanism under the CETA[192] comports a number of distinctive features which significantly departs from the traditional scheme of international arbitration in at least, three respects:

1. *The constitution of the arbitral tribunal*

The parties' right to partake in the constitution of the arbitral tribunal is considered one of the cornerstones of arbitration. The CETA departs from this conception by imposing the selection of arbitrators from a pre-established "roster".

[188] Overview of negotiation status of the FTAs and other EU trade agreements is available at: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf
[189] Signed on 30 October 2016
[190] Section 8 of the CETA concerning dispute resolution is not amongst the provisions to have come into effect
[191] See United Nations Conference on Trade and Development (UNCTAD), Reforming Investment Dispute Settlement: A stocktaking, 29 March 2019, IIA Issue Note I 2019, p. 3
[192] Section F of Chapter 8 of the CETA

As noted by AG Bot in his opinion on the conformity of the CETA with EU law, one of the novelties of the system is the creation of a permanent CETA Tribunal to hear cases brought by private investors against a Member State or the EU.[193] This Tribunal is to be composed of fifteen members appointed by the CETA Joint Committee (the executive body of the CETA) for a five year term, extendable once.[194] Each shall possess the qualifications necessary for appointment to a judicial office in their respective states or else be jurists of recognised competence and shall, in particular, have demonstrated expertise in public international law.[195]

The arbitrators must be impartial and independent, *i.e.*, not be affiliated with any government and must comply with the rules on conflicts of interest set out at Article 8.30 of the CETA. Save in exceptional circumstances, the Tribunal will sit in panels of three members to be appointed by the President of the Tribunal who must ensure that the composition of each panel is random.[196]

2. Two-tiered judicial review

The CETA also sets up an appellate mechanism for awards. Appeals are to be brought before a permanent Appellate Tribunal[197] whose members are also appointed by the CETA Joint Committee,[198] must have the same qualifications as the members of the first instance Tribunal and who are subject to the same rules of ethics.[199]

This feature also constitutes departure from the traditional perception of arbitration as a "one-stop shop" where arbitral awards are final and binding with no second instance or possibility of review as to the merits.

3. Narrowly defined jurisdiction

The CETA seeks to delimit the powers of the arbitration panels by narrowly defining the substantive rules available to them in deciding the dispute. The substantive law, pursuant to Articles 8.31.1 and 8.31.2 of the CETA, comprises the CETA itself and the principles of international law applicable between the parties. This, *prima facie,* excludes domestic law (including provisions of EU law) from the purview of the CETA panels, which may only refer to domestic law as part of the factual matrix

[193] Opinion of AG Bot, supra n. 29, paras. 26-28; CETA, Art. 8.27.2
[194]CETA, Article 8.27.2
[195] *Ibid.*, Article 8.27.4
[196] *Ibid.*, Articles 8.27.6 and 8.27.7
[197] *Ibid.*, Article 8.28
[198] *Ibid.*, Article 8.28.3
[199] *Ibid.*, Article 8.28.4

when interpreting or applying the CETA. In doing so, the arbitral tribunal must follow the prevailing interpretation given to the domestic law by the courts or authorities of the state in question - including the CJEU.[200]

There appears to be some scope for CETA panels to interpret EU law in situations where there is no such "prevailing interpretation". However, there is no procedure whereby requests for a preliminary ruling can be submitted to the CJEU (only a mechanism for soliciting an interpretation from the CETA Joint Committee[201]). In view of the position taken by the CJEU in Achmea, this raises concerns as to potential for conflict between the ISDS mechanism established under CETA and EU law.

4.1.2 Compatibility with EU law in light of Achmea

On 6 September 2017, pursuant to Article 218(11) TFEU, Belgium petitioned the CJEU for an opinion on the conformity of the ISDS mechanism contained in the CETA with EU law. The Court rendered its Opinion on 30 April 2019.

The concerns raised by Belgium went, *i.a.*, to the compatibility of the CETA with the exclusive jurisdiction of the Court over the definitive interpretation of EU law, the general principle of equal treatment and, the requirement that EU law is effective and the right of access to an independent and impartial tribunal.[202] The findings of the Court in Achmea appear highly relevant in relation to the first branch of Belgium's request. The CJEU and the Advocate General in charge of the matter, AG Bot, both elaborate extensively on this issue in their respective analyses of the CETA.

AG Bot and the CJEU both found the CETA to be compatible with EU law and, furthermore, did not see any contradiction between the Court's findings in Achmea and a finding that the CETA is compatible with EU law.

The Achmea decision, at paragraph 57, contains an *obiter dictum* which seems to have been included in order to avoid any undesired effects in relation to future FTA's or permanent investment court:

> *"It is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or*

[200] *Ibid.*, Articles 8.31.1 and 8.31.2
[201] *Ibid.*, Article 8.31.3
[202] Opinion of AG Bot, supra n. 29, para. 9

designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected."

A nearly verbatim repetition of this *dictum* is included in AG Bot's observations on the CETA[203] as well as in the final opinion delivered by the Court.[204]

AG Bot, in his analysis, follows up this statement by setting out the confines of and conditions for the submission to the jurisdiction of a court outside the EU legal order, which is permitted *"only if the indispensable conditions for safeguarding the essential character of those powers[205] are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order*."[206] AG Bot then clarified that "[the] *preservation of the autonomy of the EU legal order requires therefore, first, that the essential character of the powers of the [European Union] and its institutions as conceived in the Treaty remain unaltered'. Second, it requires that the procedure for resolving disputes will not 'have the effect of binding the [European Union] and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of [EU law]*."[207]

According AG Bot, the CETA will not impinge on the CJEU's power to issue authoritative interpretations of EU law because, although it is not unconceivable that a CETA panel might be called upon to interpret EU, pursuant to Article 8.31.2, in doing so it has to follow the interpretation given by the CJEU. When there is no guidance within the EU legal order and such an interpretation is made by that Tribunal, it is made solely for the purpose of ruling on the dispute at hand, without that interpretation being binding on the authorities or the courts of the European Union.[208] AG Bot does not expand on how this characteristic sets CETA panels apart from any other arbitral tribunals, whose decisions also only do not bind national courts or the CJEU.

This analysis and the conclusion reached by AG Bot were, by and large, endorsed by the Court.

Upon invoking the bearing principles of the EU constitutional order, which were also cited in the Achmea judgment, the CJEU recalls that the preservation of this order justifies protecting the system conceived to ensure consistency in the application and interpretation of EU norms, namely the

[203] *Ibid*., para. 65
[204] Opinion 1/17, supra n. 12, para. 106
[205] [The powers of the CJEU]
[206] Opinion of AG Bot, supra n. 29, para. 66
[207] *Ibid*., para. 67
[208] *Ibid*., para. 137

procedure of preliminary questions under Article 267 FTEU as well as the principle whereby the CJEU has the exclusive competence to determine the definitive interpretation of EU law.[209]

Against this background, and clearly inspired by AG Bot's comments, the CJEU sets out a two-pronged test to determine whether the envisaged ISDS mechanism is compatible with the EU legal framework:

First, the Court must be satisfied that the CETA "*does not confer on the envisaged tribunals any power to interpret or apply EU law other than the power to interpret and apply the provisions of that agreement having regard to the rules and principles of international law applicable between the Parties*".

Second, the Court must ensure that "*the CETA does not structure the powers of those tribunals in such a way that, while not themselves engaging in the interpretation or application of rules of EU law other than those of that agreement, they may issue awards which have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework*."[210]

The Court found that both of these conditions were satisfied because the limitations imposed on the CETA panels regarding the reach of their competence in applying and interpreting the substantive protections under the CETA - as set out in Article 8.31 of the CETA - mean that their powers do not permit them "*to call into question the level of protection of public interest determined by the EU following a democratic process*".[211]

The CJEU finally concludes that the ISDS provisions in the CETA do not adversely affect the autonomy of the EU legal order.[212]

At paragraph 126 of Opinion 1/17, the CJEU explicitly distinguishes the situation at hand from the BIT at stake in Achmea, with reference to the seemingly narrower scope for CETA tribunals to come into contact with EU law:

> *"Section F of Chapter Eight of the CETA must also be distinguished from the investment agreement at issue in the case that gave rise to the judgment of 6 March 2018, Achmea (C-284/16, EU:C:2018:158), since, as stated by the Court in paragraphs 42, 55 and 56 of that judgment, that agreement established a tribunal that*

[209] Opinion 1/17, supra n. 12, paras. 109-111
[210] *Ibid*., paras. 119
[211] *Ibid*., para. 156
[212] *Ibid*., paras. 160-161

> *would be called upon to give rulings on disputes that might concern the interpretation or application of EU law."*

In view of this unequivocal statement of the Court, the Member States might consider whether the abrogation of intra-EU ISDS following Achmea, could be averted by the them adopting interpretative statements or formal amendments to their BITs inserting choice-of-law clauses mirroring the wording of Articles 8.31.1 and 8.31.2 of the CETA.

4.2 Assessment and perspectives

As alluded to above, Chapter 8 of the CETA is intended as a sort of pilot for the ISDS system which is meant, in due course, to replace the current *ad hoc* system under BITs.[213] As noted by AG Bot:

> *"By introducing that reformed mechanism within the CETA, the European Union is supporting the initiative of a global reform of the model for settling disputes between investors and states through the development of the current ad hoc ISDS system, which is based on the principles of arbitration, into an ICS,*[214] *the culmination of which would be the establishment of a permanent multilateral court."*[215]

This intention is directly reflected at Article 8.29, which contains a *rendez-vous* clause, whereby the parties commit to work towards the creation of a multilateral court. Moreover, on 20 March 2018, the Council of the EU issued formal directions to the Commission to commence negotiations for the establishment of such a court under the auspices of the UNCITRAL.[216]

The ongoing enterprise of the EU to substitute the current BIT system with an ISDS mechanism modelled on the CETA raises the question of the aptness of this system to safeguard investors' rights at a level equivalent, or at least comparable, to that generally afforded under BITs. A comparative assessment of the substantive guarantees afforded by the CETA (and other new generation FTAs) against traditional BIT would be well beyond the scope of this dissertation. However, a number of additional comments can be made in relation to the ISDS mechanism itself.

Although there are certain similarities between the CETA ISDS mechanism and traditional investor-State arbitration,[217] the contemplated system presents a number of completely novel features, leading AG Bot to characterise it as a "*hybrid*" and "*a compromise between an arbitral tribunal and*

[213] UNCTAD IIA Issue Note I 2019, supra n. 191, p. 18
[214] Investment Court System
[215] Opinion of AG Bot, supra n. 29, para. 8
[216] Council of the European Union, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, 1 March 2018
[217] See Bernardini, supra n. 44, for an overview of the similarities between traditional BIT arbitration and the system envisaged under the new generation of FTAs

international court".[218] As mentioned in sub-section 4.1.1 above, these distinctive features include the confinement of the arbitral tribunal's normative purview to the four corners of the CETA, a second instance of judicial review, and the manner in which the arbitration panels are appointed and remunerated. The latter is what induced Belgium, as well commentators such as Bernadini,[219] to question the accord between this ISDS mechanism and parties' fundamental right to have access to an impartial and independent tribunal.

One particular feature giving rise to concern as to the independence of the CETA Tribunal is the circumstance that the members are selected by the Joint Committee, whose members, in turn, are designated by the states. The Committee is furthermore co-chaired by the Minister for International Trade of Canada and the Member of the Commission responsible for trade (or their respective designees).[220] What is more, the Committee is also in charge of the Tribunal's remuneration (retention fee and potentially the allocation of a fixed salary[221]) and decides on the renewal of the appointments.[222]

In Opinion 1/17, the Court rejected the concerns raised by Belgium without much ado, holding that the random composition of each arbitration panel as well as the obligation of the members of the arbitral tribunal to remain impartial and independent *vis-à-vis* the parties to the dispute at all times under Article 8.30.1 were sufficient to safeguard the parties' access to an impartial and independent tribunal.[223]

Notwithstanding the Court's confidence in the ability of the envisaged system to guarantee the fair and equal treatment of the parties to the dispute, the current set-up may, in the eyes of many, create an appearance of economic dependence and, as a consequence, a pro-state bias of the arbitrators.[224] Regardless of whether or not each arbitration panel is biased or not, the appearance of a bias is problematic in and of itself because the belief that the system is perched in favor of the respondent-state from the outset may dissuade investors from bringing forth potentially well-founded claims.

This is precisely the reason why all modern BITs provide for arbitration as an alternative to litigation before the state courts.

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[218] Opinion of AG Bot, supra n. 29, para. 18
[219] Bernardini, supra n. 44, p. 815
[220] CETA, Article 26.1.1
[221] *Ibid*., Article 8.27.15
[222] *Ibid*., Articles 8.27.5 and 8.27.12
[223] Opinion 1/17, supra n. 12, paras. 238-239
[224] Bernardini, supra n. 44, p. 828

As such, an investment court system modelled on the ISDS provision in the CETA does not seem like a very attractive substitute for the ISDS scheme provided for under BITs - at least not from the investors' perspective.

There is no adequate remedial framework, currently in existence or in the pipelines, capable of palliating the substantive and procedural void in the protection of rights created by the Court in Achmea.

For all of these reasons, it is difficult to reconcile the ban of traditional ISDS with Achmea and the steps taken by the EU to implement a multinational court system with the overarching objectives of the EU to facilitate the free movement of services, capital and goods and to safeguard the fundamental rights of the individual.

5. Executive summary and conclusion

In the past decades, BITs have played a significant role in the protection of investors' rights and as a means of encouraging economic transactions across borders, *e.g.*, by offering procedural and substantive assurances to investors. BITs occupy a somewhat unusual position in the international legal order in that they vest private entities and individuals with specific rights against non -complying sovereign states. In this, they are somewhat reminiscent of the EU Treaties and droit dérivé which also produce direct effects *vis-à-vis* private entities and individuals within the legal order of the Member States. However, BITs have the distinctive feature of providing for a direct course of action independent of the domestic court systems in the form of international arbitration,

It is difficult to perceive any conflict between the protective scheme provided for under the BITs and the declared purpose of the EU Treaties which seek to promote, *i.e.*, the free movement of goods and capital, as well as the respect for individual liberties. Nevertheless, the CJEU, in the recent decision of Achmea v. Slovakia of March 2018, invalidated ISDS under intra-EU BITs, on grounds of its adverse effects on the autonomy of the EU constitutional order.

Investment arbitration has suffered a severe "backlash" in the public opinion in recent years on account, *i.a.*, of the perceived lack of transparency and democratic legitimacy of the system. The generalised opposition to ISDS both at the EU - and global level may have helped to foster the conditions for to the judicial censure of the system exercised by the CJEU in Achmea.

The position of the Court in Achmea is regrettable both due both to a high degree of uncertainty it as to its scope but also because it constitutes a major set-back for the protection of the rights and procedural guarantees afforded to EU investors doing business within the territory of the EU. Going forward, these will be left with no other choice than to pursue their claims before the national courts - or abstain from investing in the territory of the EU.

Concurrently, in its foreign relations, the EU is taking steps towards setting up a permanent investment court to handle all investor-state disputes. The CJEU has recently rendered an opinion, indicating that it is satisfied that the contemplated ISDS mechanism in the pilot treaty (the CETA) does not contravene EU law. However, the ISDS system envisaged by the EU, as it currently stands, appears to suffer from one serious flaw, namely the lack of independence of the arbitrators sitting over the disputes *vis-à-vis* the states. As such, the contemplated system does not seem like a very credible alternative to one in place prior to Achmea.

6. Abstrakt på dansk / Executive summary in Danish

Bilaterale investeringsbeskyttelsesoverenskomster ("bilateral investment treaties" eller "BITs") har igennem de sidste årtier spillet en væsentlig rolle i beskyttelsen af investorers rettigheder, samt som et redskab til at fremme investeringer på tværs af landegrænser. BIT-beskyttelsen består i at meddele private investorer en række materielle og proceduremæssige garantier, der kan gøres gældende direkte imod en værtsstat (den stat hvor investeringen er foretaget) i tilfælde af traktatbrud. Heri henleder sådanne BITs tankerne på EU-retten, der også har direkte effekt for borgere i medlemslandene. BITs indtager imidlertid en helt særlig stilling i den internationale retsorden, idet de giver adgang til at rejse retskrav direkte imod en stat ved voldgift, dvs. udenom de nationale domstole.

Som udgangspunkt er det yderst vanskeligt at få øje på noget modsætningsforhold mellem BITs og EU-retten, som bl.a. sigter mod at fremme den frie bevægelse af varer og kapital mellem medlemsstaterne, samt respekten for individets rettigheder. Ikke desto mindre har EU-domstolen, i den meget omtale Achmea-dom fra marts 2018, nedlagt forbud mod brug af voldgiftsbestemmelserne i intra-europæiske BITs, under henvisning til at disse strider mod den europæiske retsorden.

Investeringsvoldgift har fået en hård medfart i den offentlige debat i de seneste år, blandt andet på grund at en udbredt opfattelse af, at systemet savner gennemsigtighed og demokratisk legitimitet. Fjendtligheden mod denne form for tvisteløsning, både på det europæiske - og globale plan, har utvivlsomt bidraget til at skabe betingelserne for EU-domstolens indgreb mod investeringsvoldgift i Achmea. Dommen begrundelser er yders sparsomme, hvilket giver anledning til tvivl om dennes betydning og rækkevidde. Endvidere skaber dommen et proceduremæssigt og materiel tomrum i beskyttelsen af investorers rettigheder. Fremadrettet vil europæiske investorer muligvis ikke have andre muligheder end at rejse deres krav ved de nationale domstole, og det kan med rette frygtes at disse derfor vil overveje at flytte deres investeringer uden for Unionens grænser.

Parallelt med denne udvikling har EU påbegyndt arbejdet med at nedsætte en multilateral investeringsdomstol, som fremadrettet skal varetage tvister mellem værtsstater og investorer. EU-domstolen har for nyligt udtalt, at den påtænkte reform er konform med EU-retten. Systemet er imidlertid ikke, i sin nuværende form, egnet til at beskytte investorers rettigheder på et niveau tilsvarende det eksisterende *ad hoc* system. Navnlig lider det påtænkte tvisteløsningssystem under i hvert fald én væsentlig mangel: Dommernes manglende uafhængighed *vis-à-vis* de indklagede stater.

7. List of literature and other materials

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Comprehensive Economic and Trade Agreement between Canada and the EU (2016; partially and provisionally entered into force pending full ratification) ("CETA")

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("New York Convention")

Energy Charter Treaty (1994) ("ECT")

ICSID Convention (1966)

Statute of the International Court of Justice (1945)

Treaty on the European Union ("TEU")

Treaty on the Functioning of the European Union (as amended by the Lisbon Treaty of 2009) ("TFEU")

Vienna Convention on the Law of Treaties (1969) ("VCLT")

Case law

<u>CJEU</u>

NV Algemene Transport - en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, 5 February 1963, Case 26-62 [ECLI:EU:C:1963:1]

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Awards[225]

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Rupert Joseph Binder v. Czech Republic (UNCITRAL), award on jurisdiction of 6 June 2007

Jan Oostergetel and Theodora Laurentius v. Slovak Republic (UNICITRAL), decision on jurisdiction of 30 April 2010

AES Summit Generation Limited & AES -Tisza Erömü Ktf v. Hungary, ICSID Case No. ARB/07/22, award of 23 September 2010

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[225] All listed arbitral awards are accessible online, *e.g.*, at: www.italaw.com

RREEF Infrastructure GP Limited and RREEF Pan-European Infrastructure Two Lux Sarl v. Kingdom of Spain, ICSID Case No ARB/13/30, decision on jurisdiction of 6 June 2016

Achmea BV (formerly known as Eureko BV) v. the Slovak Republic, PCA Case No 2008-13, award on jurisdiction, arbitrability and suspension of 26 October 2010

Charanne BV and Construction Investment Sarl v. Kingdom of Spain, SCC Case V 062/2012, final award of 21 January 2016

Anglia Auto Accessories Limited v. Czech Republic, SCC Case V 2014/181, final award of 10 March 2017

IP Busta and JP Busta v. Czech Republic (SCC Case V 2015/014) final award of 10 March 2017

PL Holdings S.à.r.l. v. Republic of Poland, SCC Case V 2014/163, partial award of 28 June 2017

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