



## IT IS NOT JUST ABOUT INVESTOR-STATE ARBITRATION: A LOOK AT CASE C-284/16, *ACHMEA BV*

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**ABSTRACT:** In the much-awaited *Achmea* judgment (of 6 March 2018, case C-284/16 [GC]), the Court of Justice held that investor-state tribunals (ISTs), “such as” the one under the Netherlands-Slovakia intra-EU bilateral investment treaty (BIT) are incompatible with EU law. In this arguably short judgment, the Court of Justice consolidated its attitude towards the relationship between other international courts and the EU legal order; it set new limits to Art. 344 TFEU; and, it expanded its list of tribunals that do not qualify as Member State courts or tribunals under Art. 267 TFEU. Nonetheless, whilst the Commission can rejoice that it can now clearly oblige Member States to terminate their intra-EU BITs, *Achmea* sends some worrying signals. The future of ISTs under Member State BITs with third countries is uncertain; so is the viability of the Investment Court System under the agreements with Canada and Vietnam, the future of the Multilateral Investment Court, and the overall coherence of the EU’s international investment law and policy.

**KEYWORDS:** Court of Justice – intra-EU BIT– investor-state arbitration – Art. 344 TFEU – Art. 267 TFEU – Multilateral Investment Court.

### I. THE “CONTEXT”

Certain decisions of the Court of Justice issued in these past few years represent veritable milestones for the EU’s relationship with the outside world and international investment law (IIL). In opinion 2/13<sup>1</sup> the Court provided the most detailed description of the ways in which other international tribunals must respect the autonomy of EU law,

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<sup>1</sup> Court of Justice, opinion 2/13 of 18 December 2014. See P. ECKHOUT, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?*, in *Fordham International Law Journal*, 2015, p. 955 *et seq.*; see also D. HALBERSTAM, *“It’s the Autonomy, Stupid!” A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward*, in *German Law Journal*, 2015, p. 105 *et seq.*, and C. KRENN, *Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13*, in *German Law Journal*, 2015, p. 147 *et seq.*

while opinion 2/15<sup>2</sup> clarified the EU's external competences over trade agreements that include investment chapters. This year's *Achmea*<sup>3</sup> sends a clear message to the Member States and investor-state tribunals (ISTs) that ISTs under intra-EU bilateral investment treaties (intra-EU BITs) are incompatible with the EU legal order.

Intra-EU BITs were predominantly concluded in the late 1980s and 1990s as regular BITs between EU Member States, on the one side, and Central and Eastern European countries, on the other side. However, following the accession of the latter to the EU, it became doubtful whether the almost 200,<sup>4</sup> now intra-EU BITs, were compatible with EU law. Furthermore, Investors from predominantly older Member States became frequent users of the investor-state dispute settlement (ISDS) mechanisms found in intra-EU BITs and the Energy Charter Treaty (ECT) against newer Member States. More recently, EU investors also began using the ECT to launch investor-state arbitrations against older Member States, such as Germany, Italy and Spain,<sup>5</sup> the latter two witnessing a veritable surge of cases brought against them. The importance of determining whether the substantive and procedural guarantees provided by these agreements were compatible with EU law was one of the reasons why the EU Commission embarked on a campaign to end these agreements, even bringing infringement proceedings against several Member States to terminate their intra-EU BITs.<sup>6</sup>

The recently delivered judgment of the Grand Chamber in *Achmea* at least clarifies that the procedural guarantees of intra-EU BITs, in the form of investor-state arbitral tribunals, are incompatible with EU law. The case has already resulted in a multitude of online commentaries, some analysing the Court's verdict from the perspective of EU law,<sup>7</sup> while others look at it from the perspective of international investment law (IIL).<sup>8</sup> This *Insight* will provide a double perspective. On the one hand, it explains how this

<sup>2</sup> Court of Justice, opinion 2/15 of 16 May 2017. See M. CREMONA, *Shaping EU Trade Policy post-Lisbon: Opinion 2/15 of 16 May 2017*, in *European Constitutional Law Review*, 2018, p. 231 *et seq.*

<sup>3</sup> Court of Justice, judgment of 6 March 2018, case C-284/16, *Achmea BV*[GC].

<sup>4</sup> United Nations Conference on Trade and Development (UNCTAD), *Intra-EU BITs and Intra-EU Disputes*, 7 March 2016, investmentpolicyhub.unctad.org.

<sup>5</sup> Currently there are 43 such cases brought against Spain. See UNCTAD, *Investment Dispute Settlement Navigator Spain*, investmentpolicyhub.unctad.org.

<sup>6</sup> H. LENK, L. RÖNNELID, J. DAHLQUIST, *The Infringement Proceedings over Intra-EU Investment Treaties – An Analysis of the Case Against Sweden*, in *Swedish Institute for European Policy Studies (SIEPS)*, 2016.

<sup>7</sup> H. SCHEPEL, *From Conflicts-Rules to Field Preemption: Achmea and the Relationship Between EU Law and International Investment Law and Arbitration*, in *European Law Blog*, 23 March 2018, europeanlawblog.eu; C. ECKES, *Don't Lead with Your Chin! If Member States Continue with the Ratification of CETA, they Violate European Union Law*, in *European Law Blog*, 13 March 2018, europeanlawblog.eu; B. HESS, *A European Law Reading of Achmea*, in *Conflict of Laws.net*, 8 March 2018, conflictoflaws.net.

<sup>8</sup> P. NIEMELÄ, *Achmea – A Perspective from International (Investment) Law*, in *European Law Blog*, 15 March 2018, europeanlawblog.eu; N. LAVRANOS, *Black Tuesday: The End of Intra-EU BITs*, in *Arbitration Blog*, 7 March 2018, arbitrationblog.practicallaw.com; S. HINDELANG, *The Limited Immediate Effects of CJEU's Achmea Judgment*, in *Verfassungsblog*, 9 March 2018, verfassungsblog.de.

case fits into the line of cases of the Court that define the relationship between the EU legal order and other international tribunals. On the other hand, it looks at how *Achmea* will affect the EU's international investment policy. As Hess notes, "*Achmea* is primarily about the primacy of Union law in international dispute settlement and only in the second place about investment arbitration".<sup>9</sup>

## II. THE BACKGROUND OF THE CASE

The case between the Dutch investor, *Achmea BV*, and the Slovak Republic has its roots in an investor-state dispute. Prior to the case before the Court of Justice, the Dutch investor initiated a United Nations Commission on International Trade Law (UNCITRAL) arbitration against Slovakia in 2008, pursuant to Art. 8 of the 1992 Netherlands-Slovakia Bilateral Investment Treaty (NL-SK BIT).<sup>10</sup> The dispute arose due to Slovakia's 2006 measure to reverse partly the liberalization of the private sickness insurance market, which it had liberalized in 2004. The investor claimed before the IST that the said measure had caused damages to its Slovak investments. In turn, Slovakia objected to the jurisdiction of the IST, arguing that after its accession to the EU in 2004, Art. 8 of the NL-SK BIT became incompatible with EU Law. The arbitral tribunal rejected Slovakia's objections<sup>11</sup> and held in favour of the investor. It ordered Slovakia to pay damages in the amount of 22.1 million euros, for breaching the fair and equitable treatment standard under the BIT and the obligation thereunder to ensure the free transfer of payments.<sup>12</sup>

Slovakia's attempts to set aside the award at the seat of arbitration in Germany were unsuccessful. The Higher Regional Court of Frankfurt (*Oberlandesgericht Frankfurt am Main*) dismissed Slovakia's action. Slovakia appealed the decision to the Federal Court of Justice of Germany (*Bundesgerichtshof*, BGH), which decided to refer three questions to the Court of Justice. In essence, the BGH asked whether Arts 344, 267, and 18 TFEU precluded the application of a provision in an intra-EU BIT that provided for investor-state arbitration. Nonetheless, the BGH doubted whether the IST provisions under the BIT were in fact incompatible with the three Articles of the TFEU.<sup>13</sup>

<sup>9</sup> B. Hess, *A European Law Reading of Achmea*, cit.

<sup>10</sup> The Bilateral Investment Treaty was originally concluded with Czechoslovakia, but after its dissolution, both countries succeeded the original BIT.

<sup>11</sup> Permanent Court of Arbitration, award of 26 October 2010 on jurisdiction, arbitrability and suspension, case no. 2008-13, *Achmea BV v. The Slovak Republic*.

<sup>12</sup> Permanent Court of Arbitration, award of 7 December 2012, case no. 2008-13, *Achmea BV v. The Slovak Republic*.

<sup>13</sup> *Achmea BV*[GC], cit., paras 15-22.

### III. THE COURT OF JUSTICE STICKS TO ITS CASE LAW

Before looking at the main arguments of the Court, some preliminary remarks are needed. First, what strikes the eye is the succinct and somewhat laconic fashion in which the Court answered the questions referred to it. Unlike the extensive opinion of AG Wathelet,<sup>14</sup> the Court decided in a mere thirty paragraphs that the IST mechanism under the NL-SK BIT is incompatible with EU law. Second, the rendering of the judgment by the Grand Chamber and the intervention of 16 Member States evidence the importance of this judgment.

Looking at the Court's arguments, one can split them into two main categories: those that relate to the characteristic of the EU legal order, and those that relate to the features of intra-EU ISTs.

Concerning the features of the EU legal order, the Court used the approach it consolidated in opinion 2/13 on the accession of the EU to the European Convention on Human Rights (ECHR). The Court relied on a set of arguments based on the autonomy of the EU legal order, its special features, the principles of mutual trust and sincere cooperation, as well as the need to ensure the uniform and effective interpretation of EU law. The Court first reiterated its long-standing case law that an international agreement cannot affect the allocation of powers under the EU Treaties and the autonomy of the EU legal order. According to the Court, the autonomy of EU law is enshrined in particular in Art. 344 TFEU, under which Member States undertake not to submit a dispute that involves the interpretation or application of the EU Treaties to a method of dispute settlement other than those provided for in the EU Treaties.<sup>15</sup> The Court then argued that the autonomy of EU law – with respect to both Member State law and international law – is justified by the essential characteristics of the EU legal order and its constitutional structure, such as the primacy of EU law and its direct effect.<sup>16</sup> Next, the Court held that Member States share a set of common values, which justifies the existence of mutual trust. Furthermore, the principle of sincere cooperation under Art. 4, para. 3, TEU obliges Member States to ensure the application and respect of EU law. Lastly, the EU judicial system – comprised of the CJEU and the national courts –, a keystone of which is the system of preliminary references established under Art. 267 TFEU, must ensure the full application of EU law, as well as its consistent and uniform interpretation.

The Court then turned to the characteristics of the IST under the NL-SK BIT. It first noted that Art. 8, para. 6, of the BIT allowed the arbitral tribunal to apply the law of the contracting parties and international agreements between them, both of which include

<sup>14</sup> Opinion of AG Wathelet delivered on 19 September 2017, case C-284/16, *Achmea BV*; see A. CARTA, L. ANKERSMIT, *AG Whatelet in C-284/16 Achmea: Saving ISDS?*, in *European Law Blog*, 8 January 2018, europeanlawblog.eu.

<sup>15</sup> *Achmea BV* [GC], cit., para. 32.

<sup>16</sup> *Ibid.*, para. 33.

EU law. Therefore, such an arbitral tribunal could be called “on to interpret or indeed apply EU law”, including the freedom of establishment and free movement of capital.<sup>17</sup> In light of this, the Court had to ascertain whether such arbitral tribunals are situated in the EU judicial system. This would ensure that their decisions are subject to “mechanisms capable of ensuring the full effectiveness of the rules of the EU”.<sup>18</sup>

The Court found that this was not the case, since the arbitral tribunal was not part of the judicial systems of the Netherlands or Slovakia. Therefore, it could not be classified as a Member State “court or tribunal” under Art. 267 TFEU and it could not make a preliminary reference to the Court of Justice.<sup>19</sup> The IST was also not a court common to several Member States, such as the Benelux Court of Justice. In such circumstances, it had to be ascertained, whether an award made by such an arbitral tribunal was subject to review by a court of a Member State, thus ensuring that the “questions of EU law which the tribunal may have to address can be submitted to the Court” via the preliminary reference procedure.<sup>20</sup> Since the original arbitration was brought under the UNCITRAL rules, the arbitral tribunal was free to choose its seat and the law applicable to the procedure governing the judicial review of the validity of the award. In this case, the German law applicable to the procedure prescribed limited grounds for the annulment of the award, in particular the consistency with public policy of the recognition and enforcement of the award. The Court admitted that in the context of commercial arbitration it had previously held that the “requirements of efficient arbitration proceedings” called for the limited review of arbitral awards.<sup>21</sup> However, commercial arbitration had to be differentiated from investor state arbitration.

The Court held that arbitration proceedings, “such as those referred to in Art. 8 of the BIT” were different from commercial arbitration, because in case of the former, Member States, not private parties, had agreed to remove those disputes from their judicial systems and thus the EU system.<sup>22</sup> In such circumstances, the considerations concerning the limited grounds for review of commercial arbitral awards did not apply to intra-EU ISTs.

In conclusion, the ISDS mechanism under the NL-SK BIT could not safeguard the full effectiveness of EU law. Furthermore, such a mechanism would also call into question the principle of mutual trust between the Member States, as well as the preservation of the specific characteristics of the EU legal system and its autonomy. Thus, Arts 267 and 344 TFEU had to be interpreted as precluding an IST under an intra-EU BIT, such as the one in the present case.

<sup>17</sup> *Ibid.*, para. 42.

<sup>18</sup> *Ibid.*, para. 43.

<sup>19</sup> *Ibid.*, para. 49.

<sup>20</sup> *Ibid.*, para. 50.

<sup>21</sup> *Ibid.*, para. 54.

<sup>22</sup> *Ibid.*, paras 54-55.

#### IV. *ACHMEA* AND THE COURT'S CASE LAW ON OTHER INTERNATIONAL TRIBUNALS

In its capacity as the constitutional architect of a new legal order,<sup>23</sup> the Court of Justice has not only defined the relationship between the EU and the Member State legal orders, but it has also created an intricate case-law on the relationship between the EU legal order and international law. These cases define: *a*) the relationship between EU law and other international tribunals;<sup>24</sup> *b*) the relationship of EU law with international agreements/customary international law and their effects in the EU legal order;<sup>25</sup> and *c*) the effects of international decisions in the EU legal order.<sup>26</sup> *Achmea* fits into the first line of cases.

The underlying idea of these cases – also reiterated in para. 57 of *Achmea* – is that, *in principle*, EU law does not prohibit the EU and its Member States to conclude international agreements that set up courts meant to interpret the said agreements, provided such courts do not interfere with the autonomy and special features of the EU legal order.<sup>27</sup> Nevertheless, because of the latter condition, the Court of Justice over the years has found several international tribunals to be incompatible with EU law, such as the proposed Court for the European Economic Area<sup>28</sup> (which later led to the acceptance of the European Free Trade Association Court),<sup>29</sup> the proposed European Patent Court,<sup>30</sup> or the EU's accession to the ECHR.<sup>31</sup> It is also worth noting that the EU is subject to the jurisdictions of the International Tribunal for the Law of the Sea and the WTO Dispute Settlement Body. However, the Court of Justice did not pronounce itself on the compatibility of these dispute settlement mechanisms with EU law, since it was not asked for an opinion on their compatibility with EU law or the questions referred for an opinion under Art. 218, para. 11, TFEU did not address the adjudicatory mechanism.<sup>32</sup>

<sup>23</sup> Court of Justice, judgment of 5 February 1963, case 26/62, *Van Gend en Loos*, p. 2.

<sup>24</sup> Court of Justice: opinion 1/91 of 14 December 1991; opinion 1/09 of 8 March 2011; opinion 2/13, cit. For an overview see S. GÁSPÁR-SZILÁGYI, *A Standing Investment Court under TTIP from the Perspective of the Court of Justice of the European Union*, in *Journal of World Investment and Trade*, 2016, p. 204 *et seq.*

<sup>25</sup> Court of Justice: judgment of 30 April 1974, case 181/73, *Haegeman v. Belgium*; judgment of 9 February 1982, case 270/80, *Polydor Limited v. Harlequin Records*; judgment of 21 December 2011, case C-366/10, *Air Transport Association of America*.

<sup>26</sup> Court of Justice, judgment of 9 September 2008, joined cases C-120/06 P and C-121/06 P, *FIAMM and Fedon v. Council*.

<sup>27</sup> S. GÁSPÁR-SZILÁGYI, *The CJEU Strikes Again in Achmea. Is this the end of investor-State arbitration under intra-EU BITs?*, in *International Economic Law and Policy Blog*, 7 March 2018, world-tradelaw.typepad.com.

<sup>28</sup> Opinion 1/91, cit.

<sup>29</sup> Court of Justice, opinion 1/92 of 10 April 1992.

<sup>30</sup> Opinion 1/09, cit.

<sup>31</sup> Opinion 2/13, cit.

<sup>32</sup> S. GÁSPÁR-SZILÁGYI, *A Standing Investment Court*, cit., p. 708; Court of Justice, opinion 2/94 of 15 November 1994. Nevertheless, the CJEU can diminish the internal effects of decisions of other international courts by granting them direct effect.

Thus, before one might conclude that the Court of Justice is hostile towards investor-state arbitration, one must understand that the Court is quite protective of its own jurisdiction against other international tribunals and courts,<sup>33</sup> regardless of whether they are long-standing regional human rights courts or *ad hoc* arbitral tribunals.

The brief manner in which the Court decided that the intra-EU IST was incompatible with EU law is also somewhat puzzling, if one looks at the Court's case law on the European Free Trade Association and European Economic Area Courts (respectively, EFTA Court and EEA Court), the European Patent Court or the European Court of Human Rights. Compared to *Achmea*, the previous cases are lengthy and the arguments of the Court are much more detailed. As the cases progressed, so did the number of conditions – set out by the Court for an extra-EU court to be compatible with EU law – increase. In these cases, the Court also embarks on a thorough analysis of each condition. For example, opinion 2/13 on the accession of the EU to the ECHR spans over 200 paragraphs and the Court sets out a multitude of conditions. The Court then thoroughly examines whether the accession agreement meets each of these conditions. On the other hand, in *Achmea* the Court heavily relies on opinion 2/13 (referenced seven times) and the conditions laid out in it, such as: the protection of the autonomy of EU law, the special features of the EU legal order, or the need to ensure the uniform and effective interpretation of EU law. Yet, a detailed analysis – comparable to the one in opinion 2/13 – of how the IST meets these conditions is lacking. As Hess notes, in *Achmea* “it is much more the outcome than the line of arguments that counts”.<sup>34</sup> Because of this approach, several lingering questions need to be addressed.

#### IV.1. A REAL RISK OF INTERPRETING AND APPLYING EU LAW

One of the decisive arguments used by the Court to find an incompatibility between the intra-EU IST and EU law referred to the real risk of an intra-EU IST award upsetting the uniform and effective interpretation and application of EU law. As the Court noted, because of the very limited possibilities to review IST awards,<sup>35</sup> there is no adequate mechanism to control how those tribunals might have interpreted and applied EU law. One could of course argue that the very fact that this case arose from a preliminary reference that concerned questions on the relationship of EU law and intra-EU ISTs is a clear indication that such a control mechanism exists. Nonetheless, such an argument would only apply in cases similar to the present one, in which the law of the seat of arbitration allows for a limited review of the award and the case arose under the UNCITRAL rules. In a case brought under the ICSID Convention or in case the country of

<sup>33</sup> S. GÁSPÁR-SZILÁGYI, *The CJEU Strikes Again in Achmea*, cit.

<sup>34</sup> B. HESS, *A European Law Reading of Achmea*, cit.

<sup>35</sup> Art. 52 of the ICSID Convention; Art. 5 of the New York Convention.

the seat of arbitration does not allow for a review of the arbitral award, such a control mechanism would not exist.

If such a control mechanism is lacking, then Member States might very well have to enforce an award that interprets EU law in a different way than the Court of Justice, which would result in some Member States applying EU law concepts in a different way than others. Thus, the uniformity and effectiveness of EU law would be in jeopardy. For example, during the arbitration that preceded the case before the Court of Justice, Slovakia argued that the provisions of the BIT were inapplicable because of the operation of Art. 30 of the 1969 Vienna Convention on the Law of Treaties concerning incompatibilities between successive treaties.<sup>36</sup> When dismissing Slovakia's arguments, the arbitral tribunal held that no rule of EU law prohibits investor-state arbitration and then went on to interpret Art. 344 TFEU as not applying to disputes initiated by private parties against EU Member States.<sup>37</sup> In the same award on jurisdiction, the IST extensively discussed the substantive protections offered by the BIT and the extent to which the freedoms guaranteed by EU law, such as the free movement of capital and the freedom of establishment, overlapped. This application and interpretation of provisions of the EU Treaties by an IST might explain why the Court of Justice felt the need in *Achmea*, a case couched in constitutional terms, to mention that an IST might risk interpreting and applying EU law provisions, such as those on the freedom of establishment and the free movement of capital.<sup>38</sup> These two examples illustrate that ISTs can, and do interpret and apply EU law.

It also needs to be mentioned that under Art. 8, para. 7, of the NL-SK BIT the arbitral award "shall be final and binding upon the parties to the dispute". As the present case illustrates, when arbitrating the case under the UNCITRAL rules the grounds for reviewing the validity of the award by a Member State court can be very limited. If this case were decided pursuant to the ICSID Convention, then a domestic court could not even review the award. Thus, in practice the interpretations of the IST would result in a binding interpretation of EU law, which – as the CJEU stressed many times – is an *exclusive* prerogative of the CJEU.

#### IV.2. SETTING NEW LIMITS FOR ART. 344 TFEU

Art. 344 TFEU forbids Member States to "submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for" in the EU Treaties. In *Mox Plant* the Court held that this provision covers Member State-Member State disputes that concern the interpretation and application of EU law,<sup>39</sup> while in opinion 2/13 the Court argued that the possibility of the European Court

<sup>36</sup> Permanent Court of Arbitration, award on jurisdiction, *Achmea*, cit., para. 268.

<sup>37</sup> *Ibid.*, paras 272-276.

<sup>38</sup> *Achmea BV* [GC], cit., para. 42.

<sup>39</sup> Court of Justice, judgment of 30 May 2006, case C-459/03, *Commission v. Ireland (Mox Plant)* [GC], paras 123 and 132.

of Human Rights to hear disputes between EU Member States undermines the requirement set out in Art. 344 TFEU.<sup>40</sup> In opinion 1/09 on the European Patent Court, the Court held that Art. 344 TFEU did not cover disputes between private parties, since the prohibition is aimed at Member States.<sup>41</sup> Academics thus began to wonder whether this provision also extended to private party-Member State disputes.<sup>42</sup> The IST in *Achmea v. Slovakia*,<sup>43</sup> the Higher Regional Court of Frankfurt,<sup>44</sup> and the BGH<sup>45</sup> all held that Art. 344 TFEU *did not* cover investor-Member State disputes.

Given this uncertainty, the first question the BGH asked the Court of Justice was whether Art. 344 TFEU precluded the application of the intra-EU BIT's provisions on investor-state arbitration. The Court answered it in the affirmative. In the final part of the judgment, it held that Art. 344 TFEU, together with Art. 267 TFEU, precludes an IST under an intra-EU BIT, "such as" the one in Art. 8 of the NL-SK BIT.<sup>46</sup> Thus, it set a new limit to Art. 344: investor-state arbitration under intra-EU BITs.

Nevertheless, the way in which the Court arrived at this conclusion is not entirely satisfying. Given the nature of the question referred to it, one would have expected the Court to embark on a detailed examination of Art. 344 TFEU, as it has done in *Mox Plant* and opinion 1/09, to ascertain whether the text, context and purpose of this Article allowed for or precluded investor-Member State arbitration. Instead, the Court chose a broad, formalistic line of arguments based on the autonomy of EU law. It only briefly mentioned Art. 344 TFEU in para. 32 of the judgment, as an embodiment of the autonomy of the EU legal order but did not embark on a thorough analysis of the wording of the provision.

Uncertainties also linger regarding the compatibility of other ISTs with EU law, such as ISTs under Member State BITs with third countries, the Investment Court System (ICS) under the agreements with Canada and Vietnam, or the soon to be negotiated Multilateral Investment Court (MIC).<sup>47</sup> Would Art. 344 TFEU preclude them as well? If one looks at the way the Court answered the German court's question on Art. 344, by couching the provision in the overall autonomy argument, then the conclusion is yes.

<sup>40</sup> Opinion 2/13, cit., paras 205-208.

<sup>41</sup> Opinion 1/09, cit., para. 63; see S. ØBY JOHANSEN, *The Reinterpretation of TFEU Article 344 in Opinion 2/13 and Its Potential Consequences*, in *German Law Journal*, 2015, p. 169 *et seq.*

<sup>42</sup> K. VON PAPP, *Clash of "Autonomous Legal Orders": Can EU Member State Courts Bridge the Jurisdictional Divide between Investment Tribunals and the ECJ? A Plea for Direct Referral from Investment Tribunals to the ECJ*, in *Common Market Law Review*, 2013, p. 1039 *et seq.*

<sup>43</sup> Permanent Court of Arbitration, award on jurisdiction, *Achmea*, cit., para. 276.

<sup>44</sup> Oberlandesgericht Frankfurt am Main, decision of 10 May 2012, case 26 SchH 11/10, *BeckRS 2012*, p. 10291.

<sup>45</sup> Bundesgerichtshof, decision of 3 March 2016, case I ZB 2/15, paras 30-39; *Achmea BV* [GC], cit., para. 15.

<sup>46</sup> *Achmea BV* [GC], cit., para. 60.

<sup>47</sup> Council of the European Union, *Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes*, 20 March 2018.

Any international arbitral tribunal, be it in an intra-EU BIT or a BIT with third countries, has the potential of interpreting and applying EU law when a dispute that concerns EU law is submitted before it. As I have previously argued, the presence of a provision, such as the one in CETA, according to which the ICS shall apply “domestic law” as fact, not law, does not ensure that in practice an IST will not interpret and apply EU law in its award, the enforcement of which is binding.<sup>48</sup>

This argument might also hold true if the MIC would not be a unidirectional mechanism to settle disputes, such as traditional ISTs, but it would allow the State to bring a case against a foreign investor as well. As Von Papp has argued, Art. 344 TFEU can support a more expansive reading that could accommodate all types of investor-State disputes.<sup>49</sup> The key here lies in the possibility that a foreign tribunal would interpret and apply EU law, without a mechanism to ask the Court of Justice beforehand how to do so.

#### IV.3. NOT A “COURT OR TRIBUNAL OF A MEMBER STATE” UNDER ART. 267 TFEU

The Court also held that Art. 267 TFEU precluded an IST under an intra-EU BIT, such as the one in the NL-SK BIT. Unlike in the case of Art. 344 TFEU, the Court spent several paragraphs explaining why the IST under the intra-EU BIT did not qualify as a “court or tribunal” of a Member State under Art. 267.<sup>50</sup>

The Court followed two lines of reasoning. The first referred to the *location* of the IST, whether it was “situated within the judicial system of the EU”.<sup>51</sup> If this were the case, the tribunal would be subject to “mechanisms capable of ensuring the full effectiveness of the rules of the EU”.<sup>52</sup> The IST in question did not meet this criterion, since it was not part of the judicial systems of the Netherlands or Slovakia, precisely because of its exceptional nature. The second line of reasoning referred to the “functions” of the referring tribunal and whether it was common to several Member States. According to the Court, the Benelux Court of Justice could refer a question to it, since it was common to a number of Member States and it was tasked with the interpretation of legal rules common to the three Benelux countries.<sup>53</sup> The IST, on the other hand, was not common to several Member States and did not have “links” to the Member States similar to the Benelux Court.

How do these two conditions compare to the existing case law of the Court? Regarding the *location* of the referring tribunal, in a previous paper I reserved my doubts whether this is a condition consistently required by the Court.<sup>54</sup> For example, in *Miles et al. v. European Schools* the CJEU refused a reference from the Complaints Board of Eu-

<sup>48</sup> S. GÁSPÁR-SZILÁGYI, *A Standing Investment Court*, cit., pp. 728-729.

<sup>49</sup> K. VON PAPP, *Clash of “Autonomous Legal Orders”*, cit., pp. 1053-1054.

<sup>50</sup> *Achmea BV*[GC], cit., paras 43-49.

<sup>51</sup> *Ibid.*, para. 43.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*, para. 48.

<sup>54</sup> S. GÁSPÁR-SZILÁGYI, *The CJEU Strikes Again in Achmea*, cit.

ropean Schools, because this international litigation body was located “outside” both the EU and the Member State systems.<sup>55</sup> On the other hand, in opinion 1/91 and opinion 1/00 the Court of Justice held that courts or tribunals, other than those of Member States, could refer questions to it for a preliminary ruling, provided the answers given by it were binding on the referring courts.<sup>56</sup> In other words, part of the Court’s case law allows for references from “external” courts, not part of the Member States’ legal systems, under certain conditions.

Furthermore, the Court did not discuss the conditions it set out in its *Nordsee* jurisprudence<sup>57</sup> for domestic arbitral tribunals that make a preliminary reference. The Court allows such references, if the jurisdiction of the arbitral tribunals is mandatory and exclusive, and the disputing parties cannot influence the jurisdiction and set-up of the arbitral tribunal.<sup>58</sup> If the Court had considered these criteria in *Achmea*, the IST under the NL-SK BIT would have failed to meet them, since its jurisdiction was not exclusive or mandatory, and the disputing parties each chose one of the arbitrators.

In conclusion, it seems that investor-state tribunals, whether *intra*- or *extra*-EU, would not qualify as domestic courts or tribunals under Art. 267 TFEU, since they are purposely placed outside of the EU judicial system, they are not common to several Member States, and they are not tasked with ensuring the uniform interpretation of the law in several Member States. Nonetheless, what about a future MIC to which all Member States and the EU would be a party? One could argue that such a world investment court would qualify as a “tribunal common to several Member States”. Thus, the Court of Justice could accept a preliminary reference from it, provided its decision was binding on the MIC.

#### IV.4. NOTHING ON ART. 18 TFEU

In its third question, the German Court asked the Court of Justice whether Art. 18 TFEU, on the prohibition of “any discrimination on grounds of nationality”, precluded the application of the IST in question. The Court exercising its judicial economy did not answer this question. For now, one can only speculate whether Art. 18 also precludes intra-EU ISTs.

According to the discrimination argument, in the intra-EU context the investors of a Member State that had concluded a BIT with the host-Member State have an advantage over investors from a third Member State, since they can resort to an extra means of dispute resolution, the IST. The BGH noted that in this case discrimination would only occur if the nationals/investors of the third Member State were in an “objectively com-

<sup>55</sup> Court of Justice, judgment of 14 June 2011, case C-196/09, *Miles et al. v. European Schools*, paras 37-39.

<sup>56</sup> Opinion 1/91, cit., paras 59-65; Court of Justice, opinion 1/00 of 18 April 2002, para. 33.

<sup>57</sup> Court of Justice, judgment of 23 March 1982, case 102/81, *Nordsee v. Reederei*.

<sup>58</sup> M. BROBERG, N. FENGER, *Preliminary Reference to the European Court of Justice*, Oxford: Oxford University Press, 2010, p. 84.

parable situation".<sup>59</sup> According to the referring court, this was not so in the present case "since the fact that the reciprocal rights and obligations apply only to nationals of the two contracting Member States is a consequence that is inherent in the bilateral agreements concluded between them".<sup>60</sup> AG Wathelet also found no incompatibility with Art. 18 TFEU, drawing on parallels with double taxation agreements.<sup>61</sup>

As with other cases of discrimination, the answer hinges on what elements (persons, products, services) are in a comparable or similar situation. If one follows the arguments of the BGH, then the investors of the third Member State would not be in a comparable situation with the other EU investors, because their Member State of nationality had not concluded a BIT with the host Member State. In other words, what one is comparing is whether the investors' Member State of nationality had or had not concluded an intra-EU BIT with the host Member State. However, one can argue that what needs to be compared is in fact the remedies that EU investors from two Member States that invest in another Member State have when the latter Member State enacts a measure that harms them.

The same could also hold true for BITs with non-EU countries, since the foreign investor from the non-EU country would have an advantage over an investor from an EU Member State when both invest in another EU Member State. The answer of whether such a BIT would breach Art. 18 TFEU hinges once again on what we compare. If we compare the judicial remedies the non-EU investor has in a host EU Member State compared to an EU investor from another Member State, then the non-EU investor definitely has an advantage. However, if we compare the remedies an EU investor has in the non-EU country, compared to what the non-EU investor has in a host EU Member State, then both investors (the EU and the non-EU) have the same opportunities: domestic remedies or the IST.

## V. *ACHMEA* AND ITS IMPLICATIONS FOR THE EU'S INVESTMENT LAW AND POLICY

The *Achmea* judgment also constitutes another element of the puzzle that consists of the Court's growing jurisprudence on the EU's investment law and policy. First, prior to Lisbon, the Court found that Austria, Finland, and Sweden<sup>62</sup> breached their Art. 351 TFEU (ex-Art. 307 TEC) obligations for failing to take the appropriate steps to eliminate the incompatibilities between the provisions on the transfer of capital in some of their

<sup>59</sup> *Achmea BV*[GC], cit., para. 22.

<sup>60</sup> *Ibid.*

<sup>61</sup> Opinion of AG Wathelet, *Achmea*, cit., paras 67-80.

<sup>62</sup> Court of Justice: judgment of 3 March 2009, case C-205/06, *Commission v. Austria*; judgment of 19 November 2009, case C-118/07, *Commission v. Finland*; judgment of 3 March 2009, judgment of 3 March 2009, case C-249/06, *Commission v. Sweden*.

BITs with third countries and EU law. Then, in opinion 2/15 the Court clarified that the provisions of the EU-Singapore FTA on portfolio investments and ISDS are under shared competence. Now, we know that ISTs found in intra-EU BITs, *such as* the ones in the NL-SK BIT, are incompatible with EU law. What next? What will happen to the pending *Micula* cases before the General Court,<sup>63</sup> to opinion 1/17<sup>64</sup> concerning the compatibility of the Comprehensive Economic and Trade Agreement (CETA) IST with EU law, or the soon to be negotiated MIC? Furthermore, how will *Achmea* affect pending and future investor-state arbitral proceedings? Let us briefly look at some of these questions.

### V.1. WHAT ABOUT ISTs WITH THIRD COUNTRIES?

*Achmea* concerned the compatibility of the IST under Art. 8 of the NL-SK BIT with EU law. However, the Court did not limit its holdings to this specific case. Instead, it mentioned eight times<sup>65</sup> that its holdings apply to tribunals “such as” the one in the NL-SK BIT. On the one hand, this means that any IST under an intra-EU BIT, “such as” the one under the NL-SK BIT, is incompatible with EU law.<sup>66</sup> On the other hand, this also raises the question whether an IST that is not “such as” the one in *Achmea* would also be incompatible with EU law. The answer to this question is important for the fate of ISTs found in Member State BITs with third countries, the Investment Court System and the proposed Multilateral Investment Court.

The following paragraphs look at some of the defining characteristics of the IST under the NL-SK BIT and how the above-mentioned – existing or proposed – arbitral tribunals compare to it.

Firstly, the arbitral tribunal in *Achmea* was set up in an intra-EU setting. Thus, if the defining feature for “such as” is that the IST is included in an intra-EU BIT, then tribunals set up under BITs with third countries, the ICS, and the proposed MIC cannot be regarded “such as” the one in the present case. Therefore, they might still be compatible with EU law. However, if the ISTs place in an intra or extra-EU BITs is irrelevant to define “such as”, then the afore-mentioned ISTs might be incompatible with EU law if one looks at other features.

Secondly, and very importantly, the Court mentioned that its case law on commercial arbitration did not apply to the IST in case, because unlike in commercial arbitration, through BITs the Member States agree to “remove from the jurisdiction of their own courts” certain disputes.<sup>67</sup> This argument is very similar to the one used by the Court in opinion 1/09. According to this argument, by conferring jurisdiction to the European Patent Court over a significant amount of potential cases regarding patents, the

<sup>63</sup> General Court, joined cases T-704/15, T-694/15 and T-646/14, *Micula v. Commission*, still pending.

<sup>64</sup> Court of Justice, opinion 1/17, still pending.

<sup>65</sup> *Achmea BV*[GC], cit., paras 31, 43, 49, 50, 55 (twice), 60, and the operative part.

<sup>66</sup> S. GÁSPÁR-SZILÁGYI, *The CJEU Strikes Again in Achmea*, cit.

<sup>67</sup> *Achmea BV*[GC], cit., para. 55.

Member States would “divest” their own courts of the possibility of handling these cases in favour of a court outside the European legal system.<sup>68</sup> In other words, any court/tribunal located outside of the EU judicial system to which Member States divest cases - that can otherwise be handled by their national courts - is in principle incompatible with EU law. This would include ISTs under BITs with third countries and the ICS. The MIC might be able to circumvent this requirement if investors were first obliged to exhaust local remedies before bringing a case at the MIC.

Thirdly, the Court held that the *Achmea* IST was not common to a number of Member States and it did not have any links to the judicial systems of the Member States, such as the Benelux Court.<sup>69</sup> One could argue that the ICS and the MIC would meet the first criterion since they would be common to a number of Member States. However, would they have a *link* to the Member States or the EU? Furthermore, ISTs under Member State BITs with third countries would not be common to a number of Member States.

It is important to recall that very few outside courts – the EFTA Court and the dispute settlement mechanism in opinion 1/00 on the establishment of a European Common Aviation Area – were held to be compatible with EU law. Furthermore, the arguments of the Court tend to be very formalistic; the Court mostly adheres to its broad, constitutionalist arguments on the need to protect the autonomy of EU law and its basic features, even when an interference with them is merely hypothetical. Thus, one cannot clearly predict whether the arbitral tribunals mentioned in this section would be compatible with EU law. Chances are, looking at how the Court interpreted the limits of Arts 344 and 267 TFEU, that they would be incompatible with EU law. These extra-EU tribunals or courts would be located outside of the EU or Member State legal systems and would not be able to refer a question to the Court of Justice on the application and interpretation of EU law. Furthermore, they would handle disputes involving EU Member States that could easily result in binding awards in which EU law is applied and interpreted. Therefore, under Art. 351 TFEU Member States would need to remove any incompatibilities between their *prior* BITs with third countries and EU law. Moreover, Member States would be under an obligation not to ratify CETA<sup>70</sup> and the Commission should think twice before pursuing negotiations for a MIC.

What is certain is that for intra-EU BITs – for which Art. 351 TFEU does not apply –<sup>71</sup> the supremacy of EU law requires Member States to remove all incompatibilities between them and EU law. This would require the termination of intra-EU BITs and the non-application of the Energy Charter Treaty's arbitration clause in the intra-EU context.

<sup>68</sup> Opinion 1/09, cit., para. 72.

<sup>69</sup> *Achmea BV*[GC], cit., para. 48.

<sup>70</sup> C. Eckes, *Don't Lead with Your Chin!*, cit.

<sup>71</sup> Court of Justice, judgment of 22 October 2009, case C-301/08, *Bogiatzi v. Deutscher Luftpool*, para. 19.

## V.2. WHAT ABOUT PENDING AND FUTURE ARBITRAL PROCEEDINGS?

How should arbitral tribunals in pending or future cases brought under intra-EU BITs and the Energy Charter Treaty proceed following *Achmea*? One could argue that as a sign of judicial comity they should consider it<sup>72</sup> and simply stop pending proceedings or decline jurisdiction for future proceedings brought under these agreements. This outcome would be favourable to the EU Commission and the respondent Member State. The investor and its home Member State, on the other hand, would find such a solution hard to accept, as it would restrict a procedural right granted to the investor by an international agreement, which is still in force, until it is not terminated together with its “sunset” clause.

In the award on jurisdiction, the *Achmea* tribunal briefly considered the possibility<sup>73</sup> that it might not have jurisdiction if Art. 8 of the NL-SK BIT was itself incompatible with EU law, since the Association Agreement between the EU and Slovakia, the Slovakian Accession Treaty or the Lisbon Treaty are subsequent agreements to the BIT. This possibility was dismissed because the tribunal interpreted EU law as not prohibiting arbitration under intra-EU BITs. Now, knowing that such arbitration is in fact incompatible with EU law, an IST that finds itself in a similar position as the *Achmea* one could argue that it lacks jurisdiction due to the said incompatibility of the successive Association, Accession or Lisbon Treaty. Still, for this rule to apply the BIT had to be concluded prior to the agreements that define the relationship between the Member State and the EU.

A second, opposite outcome is also possible.<sup>74</sup> Since the Court of Justice insists that the EU is an autonomous legal order, ISTs could simply regard EU law as domestic law that cannot be invoked to justify a breach under an international investment agreement. Investor-state tribunals have a history of upholding their jurisdiction whenever the EU Commission relies on EU law arguments to challenge their jurisdiction. There have been eight concluded investor-state cases<sup>75</sup> thus far that were brought by foreign investors against EU Member States under intra-EU BITs or the Energy Charter Treaty (ECT), in which the EU Commission intervened directly, either as amicus or as a non-disputing party, or had voiced its opinion indirectly via a letter to the respondent Member State government. The Commission challenged the jurisdiction of the arbitral tribu-

<sup>72</sup> As the arbitral tribunal set up under the United Nations Convention on the Law of the Sea did in the *Mox Plant* dispute.

<sup>73</sup> Permanent Court of Arbitration, award on jurisdiction, *Achmea*, cit., para. 273.

<sup>74</sup> See the recent post-*Achmea* award, rendered pursuant to the Energy Charter Treaty: ICSID, award of 16 May 2018, case no. ARB/14/1, *Masdar Solar & Wind Cooperatief U.A. v. Spain*, paras 296-342.

<sup>75</sup> Stockholm Chamber of Commerce, partial award of 27 March 2007, case no. 088/2004, *Eastern Sugar v. Czech Republic*; ICSID, award of 29 September 2010, case no. ARB/07/22, *AES v. Hungary II*; PCA, award on jurisdiction, *Achmea*, cit.; Permanent Court of Arbitration, award on jurisdiction of 22 October 2012, case no. 2010-17, *Euram v. Slovak Republic*; ICSID: decision on jurisdiction, applicable law and liability of 30 November 2012, case no. ARB/07/09, *Electrabel S.A. v. Hungary*; final award of 11 December 2013, case no. ARB/05/20, *Micula v. Romania*; Stockholm Chamber of Commerce, award of 21 January 2016, case no. V062/2012, *Charanne v. Spain*; ICSID, award of 4 May 2017, case no. ARB/13/36, *Eiser v. Spain*.

nals based on EU law arguments, such as a conflict between a monetary award and state aid law, or a conflict with the EU treaties, with the autonomy of EU law or its supremacy. Nonetheless, the arbitral tribunals have refused to accept the Commission's arguments in every single case and upheld their jurisdiction, often using strong words to argue that they cannot derive their jurisdiction from EU law<sup>76</sup> and that the hierarchy of norms from the perspective of EU law do not apply under international law.<sup>77</sup>

If an arbitral tribunal decides to take this second avenue, then it will not decline its jurisdiction and it will render an award. The enforcement of the award *in the EU*, however, will be a different matter. If the award was rendered pursuant to the ICSID rules, the grounds for challenging it before Member State courts are non-existent. Thus, Member States would be under an international obligation to enforce the award. On the other hand, in the intra-EU setting, EU law would have primacy over any conflicting international obligations of the Member States. If an EU Member State would enforce such an award, the Commission would either launch an infringement case or oblige the Member State to recover the amount paid as compensation to the investor, as it would violate the EU's state aid rules. If the award was rendered under the UNCITRAL rules, then there might be some limited grounds to challenge them before Member State courts, because they would breach the Member State's public policy, of which EU law is also a part.<sup>78</sup> If the Member State would still pursue the enforcement of the award, the same conclusions would apply as the ones previously mentioned for ICSID awards. However, if the losing Member States have assets *outside of the EU*, such assets could potentially be seized so that the foreign investors recover their compensation awarded by the arbitral tribunals.

## VI. CONCLUSIONS

The Dutch investor is probably wondering what went wrong. The arbitral tribunal decided in its favour under international law, but several years later the Court of Justice holds that the said arbitral tribunal is incompatible with EU law. *Achmea* will be hailed by many as putting an end to intra-EU BITs and arbitrations under them, while those who have spent money on expensive international arbitrations will curse it. What is certain is that the Court of Justice has consolidated its attitude on the relationship between other international courts and the EU legal order; it set new limits to Art. 344 TFEU; and, it expanded its list of tribunals that do not qualify as Member State courts or tribunals under Art. 267 TFEU. Nonetheless, whilst the Commission can rejoice that it can now clearly oblige Member States to terminate their intra-EU BITs, *Achmea* sends some wor-

<sup>76</sup> Permanent Court of Arbitration, award on jurisdiction, *Achmea*, cit., para. 225.

<sup>77</sup> ICSID, decision on jurisdiction, *Electrabel*, cit., para. 4.112.

<sup>78</sup> Court of Justice, judgment of 1 June 1999, case C-126/97, *Eco Swiss China Time Ltd. v. Benetton International NV*.

rying signals. The future of ISTs under Member State BITs with third countries is uncertain; so are the viability of the Investment Court System, the future of the Multilateral Investment Court, and the overall coherence of the EU's international investment law and policy.

