



## ARTICLES

### SPECIAL SECTION – THE *ACHMEA* CASE

### BETWEEN INTERNATIONAL LAW AND EUROPEAN UNION LAW

*edited by* Ségolène Barbou des Places, Emanuele Cimiotta *and* Juan Santos Vara

#### *ACHMEA* BETWEEN THE ORTHODOXY OF THE COURT OF JUSTICE AND ITS MULTI-FACETED IMPLICATIONS: AN INTRODUCTION

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I. *European Papers* has decided to open a debate on the *Achmea* case, in which the Court of Justice (CJ) found an inconsistency between provisions of a Bilateral Investment Treaty (BIT) containing an agreement to arbitrate and provisions of the TFEU.<sup>1</sup> In its groundbreaking judgment of 6 March 2018, in *Slowakische Republik v. Achmea BV*, the CJ, sitting in Grand Chamber, ruled on the compatibility with Arts 18, 267, 344 TFEU of the arbitration clause contained in Art. 8 of the BIT concluded in 1991 between the Netherlands and Czechoslovakia, and still applicable to Slovakia after the dissolution of Czechoslovakia in 1993 (hereafter NL-SK BIT). The clause enabled an investor from a State Party to bring proceedings before an *ad hoc* arbitral tribunal in the event of a dispute concerning investments in the other State Party. In spite of the opinion given by the AG Mr Wathelet,<sup>2</sup> the Court declared such an Investor-State dispute settlement (ISDS) provided by a BIT between two Member States (so-called *intra*-EU BIT) incompatible with EU law, due to the adverse effect it has on the autonomy of the EU legal system. According to the Court, therefore, the arbitral tribunal lacked jurisdiction in the case.

Scholars from different disciplines have been invited to comment upon this ruling in the present Special Section. They have been asked to examine the judgment, to evaluate its scope and to identify, as much as possible, its potential consequences. In so doing, *European Papers* aims to participate in the understanding of a ruling whose brevity contrasts with the importance of the effects it may have on international investment law and its relationships with EU law. One thus needs to engage in a dialogue with in-

<sup>1</sup> Court of Justice, judgment of 6 March 2018, case C-284/16, *Slowakische Republik v. Achmea BV*[GC].

<sup>2</sup> Opinion of AG Wathelet delivered on 19 September 2017, case C-284/11, *Slowakische Republik v. Achmea BV*.

ternational law scholarship. The CJ's ruling in *Achmea* has indeed generated remarkably critical comments among international law scholars. The first objective of this Special Section is to understand to what extent the *Achmea* judgment has stretched the differences between the logics of international law and EU law respectively. A second purpose is to tease out *Achmea's* (still) very uncertain consequences. Last, the ambition is to provide a broader analysis of such judgment. As anticipated, strictly speaking *Achmea* is about investment arbitration and the compatibility of an *intra*-EU BIT with EU law. But it should also be viewed through a "law and integration" lens.

II. Not surprisingly, *Achmea* has received numerous and important critiques from both public and private international law specialists.<sup>3</sup> These critiques revolve around four main arguments: the limited motivation of the ruling, the absence of coherence in the reasoning, the excess of radicalism of the CJ and the exclusivist – not to say expansionist – and outdated conception of EU law advocated by the Court.

<sup>3</sup> See, for example, B. ARP, *Slowakische Republik (Slovak Republic) v. Achmea B.V.*, in *American Journal of International Law*, 2018, p. 466 *et seq.*; M. AUDIT, *ECJ, Note on Judgment of the Court (Grand Chamber), March 6th, 2018, Slowakische Republik v. Achmea B.V., Case C-284/16*, in *Revue Trimestrielle de Droit Financier*, 2018, p. 28 *et seq.*; M.R. CALAMITA, *Sulla incompatibilità della "clausola ISDS" degli "intra-EU" BITs con il diritto dell'Unione europea: il caso Achmea*, in *Diritto pubblico comparato ed europeo on line*, 2018, p. 467 *et seq.*, [www.dpceonline.it](http://www.dpceonline.it); J. CAZALA, *L'incompatibilité avec le droit de l'Union européenne du système d'arbitrage investisseur-Etat contenu dans un traité bilatéral d'investissement intra-UE. A propos de l'arrêt Slowakische Republik c. Achmea du 6 mars 2018 (C-284/16)*, in *Revue Trimestrielle de Droit Européen*, 2018, p. 597 *et seq.*; E. CIMIOTTA, *The First Ever Interpretative Preliminary Ruling Concerning the Validity of an International Agreement Between EU Member States: The Achmea Case*, in *European Papers*, 2018, Vol. 1, No 1, p. 337 *et seq.*; A. DELGADO CASTEIRO, *El fin de los TBI intra-UE: una breve reflexión sobre la sentencia Achmea*, in *Aquiescencia*, 8 March 2018, [www.aquiescencia.net](http://www.aquiescencia.net); X. FERNÁNDEZ PONS, *La incompatibilidad con el Derecho de la Unión Europea del arbitraje inversor-Estado previsto en tratados bilaterales de inversión entre Estados miembros. Comentario a la sentencia del TJUE sobre el asunto Achmea, su contexto y sus implicaciones*, in *Revista General de Derecho Europeo*, 2018, p. 1 *et seq.*; L. FUMAGALLI, *Meccanismi ISDS negli intra-EU BITs: la Corte di giustizia pone fine a un lungo dibattito. E ora?*, in *Rivista di Diritto Internazionale*, 2018, p. 896 *et seq.*; E. GAILLARD, *L'affaire Achmea ou les conflits de logique*, in *Revue Critique de Droit International Privé*, 2018, p. 628 *et seq.*; B. HESS, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice*, in *Max Planck Institute Luxembourg for Procedural Research Working Papers Series*, no. 3, 2018, [www.mpi.lu](http://www.mpi.lu); J. HILLEBRAND POHL, *Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?*, in *European Constitutional Law Review*, 2018, p. 678 *et seq.*; P. IANNUCELLI, *La Corte di giustizia e l'autonomia del sistema giurisdizionale dell'Unione europea: quousque tandem?*, in *Il Diritto dell'Unione europea*, 2018, p. 281 *et seq.*; I. IRURETAGOiena AGIRREZABALAGA, *Mecanismos de arreglo de diferencias entre inversores y estados (ISDS) y la autonomía del ordenamiento jurídico de la Unión Europea: ¿una ecuación (im)posible?*, in *Revista de Derecho Comunitario Europeo*, 2018, p. 219 *et seq.*; E. LANOTTE, *Arrêt «Achmea»: une décision de principe?*, in *Journal de Droit Européen*, 2018, p. 268 *et seq.*; F. MUNARI, C. CELLERINO, *EU Law is Alive and Healthy: The Achmea Case and a Happy Good-bye to Intra-EU Bilateral Investment Treaties*, in *SIDIBlog*, 17 April 2018, [www.sidiblog.org](http://www.sidiblog.org); Y. NOUVEL, *Note sous CJUE Achmea, 6 mars 2018, C-284/16*, in *Journal du Droit International*, 2018, p. 903 *et seq.*; S. WUSCHKA, *Investment Protection and the EU after Achmea*, in *Zeitschrift für Europarechtliche Studien*, 2018, p. 25 *et seq.*

As regards, first, the brevity of the reasoning, the CJ's ruling is unanimously criticised for being elliptical. This is highly problematic given that the validity of nearly 180 *intra*-EU BITs was at stake. The Court had indeed to decide whether an *ad hoc* arbitral tribunal, such as that referred to in Art. 8 NL-SK BIT, could be regarded as a "court or tribunal of a Member State" within the meaning of Art. 267 TFEU. In his Opinion,<sup>4</sup> the AG had provided many arguments to maintain that such a tribunal was indeed a "court or tribunal" under Art. 267 TFEU. The tribunal meets the conditions required by the CJ's case-law (it is based upon law, is permanent, has compulsory jurisdiction and sufficient guarantees of independence and impartiality). In comparison, the CJ is more than concise. It only stressed that the arbitral tribunal is not part of the judicial system of the Netherlands nor of Slovakia because "it is precisely the exceptional nature of the tribunal's jurisdiction compared 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".<sup>5</sup> Needless to say, this (non)argument cannot convince the commentators. In the same vein, whereas the AG, the German Government and the referring German judge had insisted on affirming that Art. 344 TFEU does not apply to disputes between individuals and between individuals and Member States, the CJ accepted, but only implicitly, the applicability of Art. 344 TFEU in the circumstances of the case. Last but not least, the Court remained silent on a very central point: the possibility that the arbitration clause contained in Art. 8 NL-SK BIT would create a discrimination among investors on grounds of their nationality. The German judge had underlined that unlike Dutch and Slovakian investors, those from other Member States are unable to bring proceedings before an arbitral tribunal instead of a domestic court. This represents a considerable disadvantage and may constitute discrimination prohibited by Art. 18 TFEU. Amazingly the Court omitted to answer on this central question.

The lack of coherence is another alleged flaw of the judgment. There is, firstly, a defective logic in the Court's reasoning. The solution given by the CJ is indeed mainly based on the argument that an arbitral tribunal, such as that envisaged by Art. 8 NL-SK BIT, is not entitled to make a reference for a preliminary ruling pursuant to Art. 267 TFEU. Hence the adverse effect on the autonomy of the EU legal order: it cannot be guaranteed that an arbitral award is subject to review by a court of a Member State nor, as a result, that the questions of EU law that the arbitral tribunal may have to address are submitted to the CJ by means of a reference for a preliminary ruling pursuant to Art. 267 TFEU. One can only note the paradox of enouncing this impossibility in a case... which was precisely born from a preliminary reference made by the German judge before the CJ. A number of commentators have stressed another incoherence in the Court's reasoning: while it refers to the specific ("exceptional") nature of investment arbitration tribunals at the beginning of its judgment, this specificity (in particular the

<sup>4</sup> Opinion of AG Wathelet, *Achmea* [GC], cit.

<sup>5</sup> *Ibidem*, para. 45.

rules applied and interpreted by arbitral tribunals) is passed over in silence when the CJ comes to evaluate whether the arbitral tribunal under Art. 8 NL-SK BIT has the possibility of applying and interpreting EU law.

Radicalism, for many international law specialists, is a third shortcoming of the ruling. Indeed, the CJ omitted to consider the possible alternatives to the declaration of invalidity of the arbitration clause at stake. The Court could have distinguished, for instance, between arbitral tribunals resorting to the jurisdiction of third States and those resorting to the jurisdiction of Member States. It also had the opportunity to make the validity of the clause conditional upon the possibility, for a national judge, of reviewing the compatibility of the arbitral award with EU law.<sup>6</sup> Another viable option, for the Court, was to limit the scope of its decision to the (rare) cases in which arbitral tribunals are actually asked to apply or interpret EU legal provisions. However, the CJ preferred to maintain a less nuanced position.

The fourth – and probably more fundamental – critique is related to the so-called exclusivist, expansionist and outdated conception of the autonomy of the EU legal order. Critiques are sharp: the Court is under attack for having forgotten that, under international law, there is no hierarchy between international treaties.<sup>7</sup> The main critiques target the part of the judgment which deals with the applicability of Art. 344 TFEU. The CJ ruled that, pursuant to the NL-SK BIT, the arbitral tribunal is called to rule only on potential infringements of the NL-SK BIT but to this end it must, in accordance with Art. 8, para. 6, NL-SK BIT, take into account the law in force in the concerned Contracting Party and any relevant agreements between the Contracting Parties. Unsurprisingly, the CJ held that EU law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between Member States: “it follows that on that twofold basis the arbitral tribunal referred to in Art. 8 of the BIT may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital”.<sup>8</sup> It is this last sentence that has generated the bulk of criticism. E. Gaillard, with many others, stressed that in most cases arbitral tribunals do not apply nor interpret EU law.<sup>9</sup> Likewise, Mr Wathelet, several Member States and the German referring judge argued that the fact that EU law is part of the law applicable to disputes between investors and States in accordance with Art. 8, para. 6, NL-SK BIT does not mean that those disputes concern the interpretation or the application of the EU

<sup>6</sup> E. GAILLARD, *L'affaire Achmea*, cit., p. 628.

<sup>7</sup> M. AUDIT, *ECJ, Note on Judgment of the Court (Grand Chamber), March 6th, 2018*, cit., p. 26. See also, for an analysis of the judgment as regards the rules of Treaty conflicts, V. BARAUSOVA, *Slovak Republic v. Achmea from a Public International Law Perspective: Is State Consent to Arbitrate Under Intra-EU BITS Still Valid?*, in *European Investment Law and Arbitration Review Online*, 29 November 2018, www.brill.com.

<sup>8</sup> *Achmea* [GC], cit., para. 42.

<sup>9</sup> E. GAILLARD, *L'affaire Achmea*, cit., p. 632.

founding Treaties. And this is so for two main reasons. First, the arbitral tribunal has jurisdiction only to rule on alleged breaches of the NL-SK BIT. Second, the scope of the NL-SK BIT and the legal rules that it introduces, are not the same as those of the TEU and the TFEU.<sup>10</sup> In the same vein, M. Audit insists on the fact that the scope of the NL-SK BIT is wider than that of the EU founding Treaties as it covers State acts or omissions likely to impact a foreign investor and its investment; for him, these rules do not apply in cases where European Treaties are enforced.<sup>11</sup> As a result, the Court is believed to be “expansionist”. Many commentators agree that, apart from State aid law (it could happen, for instance, that a defendant Member State argues that a national State aid had to be modified in application of EU law), the application and interpretation of EU law by an arbitral tribunal such as that provided by the NL-SK BIT is mostly hypothetical. Hence the critique addressed to the Court: a simple eventuality cannot be sufficient to trigger a reaction founded on the logic of exclusivism. Lastly, Y. Nouvel<sup>12</sup> questions what he thinks is the blind and outdated logic of the CJ: isn’t it pure utopia, he asks, to assume that EU law can be insulated from external bodies? In daily life, the EU participates in the activities of international organisations and in the adoption of international agreements. Consequently, it frequently happens that non-EU entities provide their own interpretation of EU law. The attitude of the Court in *Achmea*, according to Nouvel, can best be described as a utopian project of normative autarchy. In sum, from the perspective of both public and private international law, the *Achmea* judgment is flawed and gives evidence of the problematic closure of EU law.

III. It is likewise remarkable that, shortly after the CJ delivered its judgment, nearly all stakeholders – including Member States,<sup>13</sup> EU institutions, arbitral tribunals, international law scholars, EU law scholars – have striven to draw from *Achmea* the fullest and most far-reaching set of consequences in all sorts of fields – whether normative, judicial and even political – perhaps going somehow beyond the purposes of the CJ itself.

First, as regards a normative level, questions have been raised whether the applicability and validity not only of the NL-SK BIT, but also of other *intra*-EU BITs and even *extra*-EU BITs concluded between Member States and third countries, as well as of trade and investment agreements concluded between the EU itself and third-countries (such as the Energy Charter Treaty of 17 December 1994 (ECT) and the Canada-EU Comprehensive Economic and Trade Agreement of 30 October 2016 (CETA)), may be somehow

<sup>10</sup> *Ibidem*, p. 173.

<sup>11</sup> M. AUDIT, *ECJ, Note on Judgment of the Court (Grand Chamber), March 6th, 2018*, cit., p. 32.

<sup>12</sup> Y. NOUVEL, *Note sous CJUE Achmea*, cit., p. 917.

<sup>13</sup> Declaration of the Member State of 15 January 2019 on the legal consequences of the *Achmea* judgment and on investment protection, [www.ec.europa.eu](http://www.ec.europa.eu).

directly affected by *Achmea*, if and to the extent they contain ISDS clauses whose content and effects are similar to those of Art. 8 NL-SK BIT.

Second, the same question has been raised – at a judicial level – with respect to both ongoing and forthcoming proceedings before international and arbitral investment tribunals and to the prospect of domestic judges, whenever called upon to rule on the lawfulness of rulings *medio-tempore* eventually issued by such investment tribunals, refraining from executing or enforcing them or from declaring them void.

Third – at a political level – the necessity has been held, especially by the European Commission, on the one hand of releasing *intra*-EU BITs, *extra*-EU BITs and instruments of trade and investment cooperation between the EU and third-countries from ISDS mechanisms, and, on the other hand, of conceiving institutional and normative novelties, such as, just to name a very well-known example, the proposed establishment of a Multilateral Investment Court (MIC). The purpose of this Court is to have a permanent international body that can settle investment disputes between investors and States. The MIC would replace the current system of ISDS based on *ad hoc* arbitration. According to its proponents, the MIC is meant to enhance predictability and consistency, ensure correctness, eliminate the ethical concerns in the current system and effectively address the problem of excessive costs and duration, by bringing key features of domestic and international courts to investment arbitration. On 13 September 2017, the Commission recommended the opening of the negotiations on the establishment of the MIC<sup>14</sup> and on 20 March 2018 – just two weeks after the *Achmea* judgment was given – the Council adopted the negotiating directives authorizing the Commission to negotiate, on behalf of the EU, an agreement on said project.<sup>15</sup> On the basis of the mandate granted by the Council, the Commission started talks with its partners at the United Nations Commission on International Trade Law (UNCITRAL). The proposed MIC is meant to adjudicate disputes under both future and existing investment treaties and to replace the bilateral investment court systems included in EU trade and investment agreements. While talks are currently ongoing and of course it is still uncertain whether they will lead to the desired reforms, or to any changes at all, so far the EU has made clear that it would favour a permanent international institution with an appeal mechanism; allowed to rule on disputes arising under future and existing investment treaties that States chose to submit to its jurisdiction; composed of full-time, tenured, qualified and independent adjudicators; enabled to conduct proceedings in a transparent manner and to issue decisions expected to be effectively enforced.

As one can easily see, *Achmea* has caused a considerable stir in the EU.

<sup>14</sup> Commission Recommendation for a Council Decision COM(2017) 493 final of 13 September 2017 authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes.

<sup>15</sup> Council Document 12981/17 ADD 1 DCL 1 of 20 March 2018 on negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes.

IV. Because of all these potential effects on investment law and arbitration, there are good reasons to believe that *Achmea* will remain in law textbooks as a landmark case on the relationship between EU law and international investment law. But there is another possible reading: one that views the judgment as a lecture of EU constitutional law. The center of gravity of the judgment could well be in its first part, in which the CJ restated the crucial importance of the autonomy of the EU legal order and of the principles governing EU legal life (supremacy, mutual trust and sincere cooperation). The Court was also very attentive to the preservation of the “essential characteristics of the EU and its law”, to “the constitutional structure of the EU” and to the “very nature of that law”.<sup>16</sup> Thus *Achmea* seems to be much more than a mere judicial ruling, since it could launch somehow a new stage of the European integration process, inaugurating what perhaps may be called a “constitutional moment”. *Achmea* is not just a judgment on foreign direct investment or on related dispute settlement modalities among two or more Member States. As seen above, it prompted important normative amendments not only within the EU legal context but also in international investment arbitration at large. Likewise, *Achmea* depicts the muscular attitude of the CJ in the international adjudication’s landscape and calls into question the relationship between EU law and international investment law as regards investor-State dispute settlement. This is proved by the strong opposite views maintained by international investment law and EU law specialists about the legitimacy and correctness of the Court’s reasoning and conclusions.

The progression of the Court’s reasoning must be followed to uncover the “constitutional” objective pursued in *Achmea*. The CJ first holds that EU law is “based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU”.<sup>17</sup> Then the Court deals with the means at its disposal to protect the foundations of the EU legal order: “in order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law”.<sup>18</sup> To put it differently, the integrity of EU law – and its foundations – are protected by a collective endeavor: altogether, domestic judges and the CJ participate in the full application of EU law and the effective judicial protection of the rights it confers upon individuals. The Court’s focus, at this stage of the reasoning, is on what it names the European “judicial system”. The systemic aspect of the judicial organization is decisive: the CJ describes the European judicial organization as a network of judges, aimed at “setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States”, with the

<sup>16</sup> *Achmea* [GC], cit., para. 33.

<sup>17</sup> *Ibidem*, para. 34.

<sup>18</sup> *Ibidem*, para. 35.

object of “securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy”.<sup>19</sup> The objective pursued by the Court in *Achmea* is clearly to insulate the European “judicial system” from disintegrative effects. This is why the CJ is obsessed by the preliminary ruling procedure, as it is best suited to ensure a judicial dialogue that can secure interpretation of EU law consistent with the Member States’ common values.

Under this perspective, *Achmea* may be considered part of a broader judicial development. Its full appraisal suggests indeed that one read it in conjunction with *Associação Sindical dos Juizes Portugueses*<sup>20</sup> and *Minister for Equality for Justice and Equality*.<sup>21</sup> In these cases, which have arisen from the context of the rule of law crisis, the Court puts the emphasis on the independence of domestic judges. Judicial independence is indeed the pre-condition for a European judicial dialogue. *Achmea* may also be related to *Commission v. France*,<sup>22</sup> in which, for the first time, the CJ found that a court against whose decisions there is no judicial remedy should have requested a preliminary ruling pursuant to Art. 267 TFEU in order to avert the risk of an incorrect interpretation of EU law. Since the French *Conseil d’État* failed to make such a reference, although the correct application of EU law in its judgments was not so obvious as to leave no scope for doubt, an infringement of Art. 267 TFEU occurred. *Commission vs France* met with fierce criticism in France but it gives evidence of the Court’s willingness to protect, as much as possible, the judicial dialogue among domestic judges and the Court. This dialogue implies that all courts in the system respect their respective roles. Little by little – and *Achmea* is a crucial step forward – the CJ is designing the main features of what can be termed the “European model of justice”.

This is why the facts and circumstances of the *Achmea* case were so challenging. The Court had to determine to what extent – if at all – Member States could rely on a parallel dispute settlement mechanism without putting at risk the proper functioning of the European judicial system. In particular, the CJ had to deal with two problematic aspects of investment arbitration resulting from the conditions laid down in the NL-SK BIT.

It first raised concerns about the limited capacity of domestic judges to review the compatibility of arbitral awards with provisions of EU law, since the possibility to seek such review was fully dependent on the law of the seat of arbitration. In the *Achmea* case, it was the choice to have the seat in Germany that alone enabled Slovakia to seek judicial review of the arbitral award, by instituting proceedings before a German judge.

<sup>19</sup> *Ibidem*, paras 35 and 37.

<sup>20</sup> Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juizes Portugueses* [GC].

<sup>21</sup> Court of Justice, judgment of 4 December 2018, case C-378/17, *Minister for Equality for Justice and Equality* [GC].

<sup>22</sup> Court of Justice, judgment of 4 October 2018, case C-416/17, *Commission v. France*.



But what would have happened if the parties had chosen another Member State, or a third State, as a seat of arbitration?

A second flaw concerned the scope of the judicial review, since it could be exercised only to the extent that German law permitted. Such review was limited to the validity of the arbitration agreement under applicable law in Germany and the consistency with public policy of the recognition or enforcement of the arbitral award. Unsurprisingly the Court found this to be problematic, as it did not correspond to the requirement that an arbitral award is, “in accordance with Article 19 TEU, subject to review by a court of a Member State, ensuring that the questions of EU law which the tribunal may have to address can be submitted to the Court”.<sup>23</sup> The CJ thus requires full capacity of the host State’s domestic judges to review the legality of arbitral awards, at least as regards the application and interpretation of EU law. This high standard of justice was justified by the fact that EU values and citizen’s rights are at stake together with mutual trust: “Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU”.<sup>24</sup>

The BIT provision enabling an investor to bring proceedings before an arbitral tribunal raised another, very serious, difficulty. E. Gaillard<sup>25</sup> rightfully speaks about a “clash of logic” between investment law justice and EU law justice. Under investment law, the objective is to protect investors from what is perceived to be a “biased” justice: national judges are not assumed to be impartial. In order to guarantee a neutral judicial mechanism, arbitration is made fully independent from any national judicial system. This is what the CJ describes as being “precisely the exceptional nature” of the arbitral tribunal’s jurisdiction compared with that of Slovakian and Dutch courts. It is precisely due to this peculiarity that the arbitral tribunal established pursuant to the NL-SK BIT could not be qualified as a “court or tribunal of a Member State” within the meaning of Art. 267 TFEU. Therefore, despite the value of his arguments, the AG Mr Wathelet missed the point. While he strived to convince the Court that the arbitral tribunal was a “tribunal”, he omitted that the essential issue was, instead, to determine whether the arbitral tribunal set up by the NL-SK BIT met the conditions to be qualified as a “national” adjudication. The focus in *Achmea* was not on the judicial but on the national nature of the arbitral tribunal.

The CJ was coherent with its previous case law. In *Ascendi Beiras Litoral*,<sup>26</sup> the Court derived the status of “court or tribunal of a Member State” of the Tribunal Arbitral Tributário from the fact that it was part of the system of judicial resolution of tax dis-

<sup>23</sup> *Achmea* [GC], cit., para. 50.

<sup>24</sup> *Ibidem*, para. 58.

<sup>25</sup> E. GAILLARD, *L'affaire Achmea*, cit., p. 628.

<sup>26</sup> Court of Justice, judgment of 2 June 2014, case C-377/13, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta*.

putes provided for by the Portuguese Constitution. In *Parfums Christian Dior*,<sup>27</sup> the Court even accepted that a court common to a number of Member States, such as the Benelux Court of Justice, would refer questions for a preliminary ruling pursuant to Art. 267 TFEU in the same way as domestic judges of any one of the concerned Member States. In short, according to the CJ, the capacity to belong to the European judicial system does not depend on a specific structure or institutional setting but on the integration into the national judicial system of at least one Member State.

In sum, *Achmea* is not simply a case about international investment law and EU law. It is about models of justice. Several investment law specialists have read *Achmea* as providing a negative value judgment on arbitration. Their analysis seems to be indirectly supported by the European Commission's 2018 communication on the protection of *intra*-EU investment. It underlines that, unlike the mechanisms envisaged by *intra*-BITs, the EU offers a "complete and exhaustive system" of judicial remedies, which affords full protection of fundamental rights and "is not only aimed at compensating investors after the violation has taken place", but also "at the prevention or resolution of violations of their rights".<sup>28</sup> But the CJ is more nuanced. Its focus is not on the merits or drawbacks of arbitral justice as such. It is on the capacity of arbitral justice mechanisms, as organized by an *intra*-EU BIT, to be adapted to the requirements of EU justice, which is organized as a "system".

Furthermore, the intense defence of the autonomy of the EU legal order in *Achmea* allowed the CJ to support another policy pursued by the Commission, which shortly after the entry into force of the Lisbon Treaty, and the inclusion of direct foreign investments in the common commercial policy under Art. 207 TFEU, urged the Member States to terminate all *intra*-EU BITs still in force, but without any success.<sup>29</sup> The Commission considered *intra*-EU BITs, due to their nature of bilateral differentiated regimes on investments, as an anomaly *vis-à-vis* the uniform integration of markets in Member States, as well as the uniform interpretation and effective application of EU rules on free movement of capitals and on the right of establishment.

In view of all this, *Achmea* cannot be understood in isolation from the context of the rule of law crisis and the disintegrative forces currently threatening the EU. The CJ endeavors to protect the Union and EU law from surreptitious forms of disintegration, coming from direct attacks on justice or from competing models of justice that do not meet the high standards of EU justice, as shaped by the Court itself. Whatever its flaws, *Achmea* is an important case as it provides insights on the kind of justice that is and ought to be promoted in the EU.

<sup>27</sup> Court of Justice, judgment of 4 November 1997, case C-337/95, *Parfums Christian Dior*.

<sup>28</sup> Communication COM(2018) 547 final of 19 July 2018 from the Commission concerning the protection of *intra*-EU Investment.

<sup>29</sup> Commission press release IP/15/5198 of 18 June 2015, europa.eu.

However, in doing this, the risk is that the CJ makes the EU a closed legal system, grounded on the autistic defense of its values, its fundamental freedoms and its mechanisms of judicial protection. The EU could thus be shaped as an overconfident organization, having a growing mistrust of other and different legal regimes of investment protection. Such clinging policy might prove difficult to reconcile with the EU's need for international trade relations, unless and until it proves able to enforce its economic and political power *vis-à-vis* its commercial partners, as today most international trade and investment agreements are far-reaching and provide for ISDS-like mechanisms. Due to *Achmea* and the ensuing complexities of the EU legal system, the EU could run the risk of being perceived as a too demanding partner. It seems that in the much-awaited opinion 1/17 on the compatibility with EU law of the investor-State dispute settlement mechanism provided for by CETA,<sup>30</sup> which unfortunately could not be taken into account by the participants to this Special Section the Court has wisely avoided these pitfalls...

**Ségolène Barbou des Places\***  
**Emanuele Cimiotta\*\***  
**Juan Santos Vara\*\*\***

<sup>30</sup> Court of Justice, opinion 1/17 of 30 April 2019.

\* Professor of Public Law, Université Paris 1 Panthéon Sorbonne, [segolene.barbou-des-places@univ-paris1.fr](mailto:segolene.barbou-des-places@univ-paris1.fr).

\*\* Assistant Professor of International Law, Sapienza University of Rome, [emanuele.cimiotta@uniroma1.it](mailto:emanuele.cimiotta@uniroma1.it).

\*\*\* Professor of International Law and International Relations, University of Salamanca, [savajuan@usal.es](mailto:savajuan@usal.es).

