The End of the Game: The Autonomy of the EU Legal Order Opposes Arbitral Tribunals under Bilateral Investment Treaties Concluded between Two Member States

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Case C-248/16, *Achmea*, (CJEU, 6 March 2018)

Bilateral investment treaty concluded between two Member States – State dispute settlement mechanism established by an intra-European Union bilateral investment treaty – Arbitral tribunal – Compatibility with Articles 18, 267 and 344 TFEU – Concept of "court or tribunal" for the purpose of Article 267 – Autonomy of EU law

I. Introduction

The international law on investment is particularly fragmented. In 2017, 2,396 bilateral investment treaties (BITs) were in force, whilst a further 303 treaties included provisions governing investment (TIPs).[1] This cluster of investment treaties is complemented by two key arbitration treaties: the 1958 New York Convention for enforcement of arbitral awards,[2] and the 1965 ICSID Convention,[3] which lays down forum and procedural rules for investment treaty arbitration.

Western European countries have contributed significantly to the development of international investment law. The first BIT was signed in 1959 between West Germany and Pakistan,[4] whilst the Netherlands concluded a similar treaty with Indonesia in 1968. Furthermore, the first procedural mechanism allowing foreign investors to bring a case directly against the country in which they have invested (host State) before an independent international arbitration tribunal – Investor-State Dispute Settlement (ISDS) – was introduced within the 1969 BIT concluded between Italy

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[1] UNCTAD investment hub website: <investmentpolicyhub.unctad.org>.

[2] United Nations Convention for Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958.

[3] Convention on the Settlement of International Investment Disputes between States and Nationals of Other States, done at Washington, 18 March 1965 (also known as the Washington Convention).

[4] Treaty for the Promotion and Protection of Investments (with Protocol and exchange of notes), Germany and Pakistan, 25 November 1959, 457 UNTS 24 (entered into force 28 November 1962).

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and Chad.[5] Further dispute settlement provisions were included in BITs following the establishment of the International Centre for Settlement of Investment Disputes (ICSID) in 1965. Under the auspices of the World Bank, the ICSID can adjudicate "any legal dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State".[6]

Whereas the subjects of public international law are states, international investment law grants private parties, as investors, a number of rights that can be invoked directly either before domestic courts or the ISDS. Although BITs provide for reciprocal obligations between the contracting parties, it must be borne in mind that the balance of power is asymmetrical, since Western investors are more likely to take advantage of these treaties than the developing countries in which the investment is made.

EU Member States have been negotiating and concluding investment agreements with third countries (extra-EU BITs) and between themselves (intra-EU BITs). Whereas in the 1970s and 80s BITs were concluded between Western countries and developing countries, a new wave of BITs emerged in the wake of the fall of the Berlin Wall in 1989. Investors from market based economies in the Member States of the former European Economic Communities required specific protection while investing in central European states. Accordingly, a number of BITs were concluded between the new Member States and the old states. Today, 181 intra-EU BITs are in force.

In 1994, both the EU[7] and its Member States concluded the Energy Charter Treaty (ECT).[8] Only one Member State, Italy, has withdrawn from the ECT.[9] This is therefore a mixed agreement.[10] The ECT has the same status in the EU legal order as a purely EU agreement (exclusive competence) insofar as its provisions fall within the scope of EU competence.[11] Since the ECT is a mixed agreement, it follows that it is implemented and managed jointly by the EU and the Member States. In addition, the EU is legally bound by the obligations on fair and equitable treatment and non-expropriation contained in the ECT.[12] The compliance by EU secondary law with the ECT obligations may be subject to review before the EU courts. Needless to say, secondary law must be interpreted in accordance with the EU's obligations stemming from the ECT.[13]

BITs confer extensive substantive protection on investors: most favoured nation clause, fair and equitable treatment, free transfer of capital, prohibition on direct and indirect expropriations.

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[5] C Brown, "The Development by States of Model Bilateral Investment Treaties" in W Shan (ed.), *China and International Investment Law: Twenty Years of ICSID Membership* (Brill 2014) 124.

[6] Art 25(1).

[7] Council and Commission Decision 98/181/EC, ECSC, Euratom of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (OJ 1998 L 69, p 1).

[8] Adopted 17 December 1994, 2080 UNTS 95, entered into force 16 April 1998.

[9] The withdrawal took effect only on 1 January 2016.

[10] A Rosas, "Mixed Union-Mixed Agreements" and L Granvik, "Incomplete Mixed Environmental Agreements of the EU and the Principle of Bindingness" in M Koskenniemi (ed.), *International Law Aspects of the EU* (Den Hague, Kluwer Law International 1998) 125 and 255; P Okowa, "The EC and International Environmental Agreements" (1995) 15 *Yearbook of European Environmental Law* 169.

[11] Case C-213/03 *Etang de Berre* [2004] ECR I-7357, para. 25.

[12] Opinion of AG Jääskinen in Case C-264/09 *Commission v Slovakia*, para. 60.

[13] Case C-61/94 *Commission* v *Germany* [1996] ECR I-3898, para. 52.

Regarding litigation, most BITs provide for a choice of forum, allowing foreign investors to choose whether to litigate their case in the domestic courts of the host state or within international arbitration, with investment treaties usually determining how these two options are coordinated. Nevertheless, ISDS is deemed to be the cornerstone of the BITs. Under ISDS, the investor claims that the host state has breached rights set out in the BIT concluded between the investor's home state and the host state. In practical terms, the foreign investor and the host state submit their dispute to an arbitral tribunal for resolution according to agreed substantive and procedural rules.

ISDS was developed on the initiative of developed capital-exporting states in order to protect their investors abroad. ISDS allows for the depolitisation of investment disputes without generating tensions between the investor's home state and the host state. The investment community is inclined to take the view that arbitral tribunals are the most appropriate fora for the settlement of disputes between investors and states. The speed of the procedures and their confidentiality appear to be more aligned with the expectations of investors than classical judicial proceedings.

ISDS has been successful so far. ISDS cases increased from 326 in 2008 to 608 cases at the end of 2014, involving both developed and developing countries as defendants. More than half of the registered ISDS cases under the ECT have been brought by an investor from one EU Member State against another EU Member State as the respondent state.[14]

Though it is inspired by commercial arbitration, ISDS differentiates itself from arbitration. Firstly, whereas commercial arbitration "originate[s] in the freely expressed wishes of the parties", ISDS results from a treaty by which the Member States agree to remove a matter from the jurisdiction of their own courts.[15] Secondly, the foreign investor is entitled to bring its claim before the arbitral tribunal and is thus not required to exhaust any judicial options under internal law. Thirdly, investors can invoke the rights encapsulated in the BIT before arbitral tribunals, whereas national courts are often more reluctant in acknowledging the direct effect of international agreements.[16]

Over these last years, ISDS has given rise to heated debate. In 2014, *The Economist* published a critical analysis of ISDS:[17] the implementation of the laudable ideas to protect investors from discrimination or expropriation was branded as "disastrous". "Multinationals have exploited woolly definitions of expropriation to claim compensation for changes in government policy that happen to have harmed their business". At the same time, academics have started to question whether ISDS delivers the benefits it is supposed to. Due to broadly defined investment protection standards, investors can use ISDS to bring a wide variety of claims, challenging also host states' actions that seek to achieve legitimate public policy goals, such as the protection of health, the environment or public safety. In contrast to adjudication by domestic courts, these disputes raise a number of issues regarding forum shopping. Furthermore, the

[14] According to the UNCTAD database, of total 102 ISDS cases under the ECT, 65 are intra-EU disputes.

[15] *Achmea*, para. 55.

[16] Opinion of AG M Wathelet, para. 206.

[17] "The arbitration game", *Economist,* 10 October 2014, p 74.

broad interpretation by the investment tribunals of the protection afforded to investors in the BITs has called into question state regulatory powers in sensitive areas such as public health and safety, financial regulation, or environmental protection. It follows that the government's ability to regulate in policy matters of public concern is constrained by the existence of these treaties, which ultimately impinge on state sovereignty.

In July 2010, the European Commission issued a communication "Towards a Comprehensive European International Investment Policy".[18] Regarding ISDS, the Commission made the following proposals:

— to ensure that ISDS is conducted in a transparent manner (including requests for arbitration, submissions, open hearings, *amicus curiae* briefs and publication of awards);

— to consider the use of quasi-permanent arbitrators (as in the EU's FTA practice) and/or appellate mechanisms, where there is a likelihood of many claims under an agreement;

— to explore the possibility that the EU seeks to accede to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), noting that this would require amendment of the ICSID Convention.

ISDS has recently come under fire during the course of negotiations for the Comprehensive Economic and Trade Agreement (CETA) and Transatlantic Trade and Investment Partnership (TTIP). The EU is pushing for the replacement of the current arbitration system with a mechanism for adjudicating investment disputes that enjoys greater legitimacy, specifically a permanent Investment Court System (ICS), comprised of a permanent tribunal and an appeal tribunal. In addition, CETA lays down new rules governing the conduct of investment dispute proceedings, imposing strict standards of ethical behaviour for the members of the tribunal along with a requirement of full transparency. Last but not least, CETA also includes an explicit reference to the right of governments to regulate in the public interest and to introduce more precise investment protection standards, in an attempt to ensure that they are not open to broad interpretations. Nevertheless, the future of ICS as a mechanism for the resolution of investment disputes within the EU will depend on the finding by the Court of Justice of the EU (CJEU) concerning the compatibility of the ICS with EU law in an opinion requested by the Belgian Federal Government by virtue of Article 218(11) TFEU. Last but not least, on 20 March 2018, the Council adopted negotiating directives allowing the European Commission to negotiate a convention establishing a multilateral court for the settlement of investment disputes. Given that such a convention falls under a shared competence, the Union and the Member States participating in the negotiations are called on to coordinate their positions and act accordingly throughout the negotiations.

By the same token, other states, such as Australia, are becoming more reluctant to embrace ISDS as the cornerstone of investment law. The case brought by Philip Morris

[18] Commission Communication, "Towards a Comprehensive European International Investment Policy" COM (2010) 343 final, 7 July 2010.

before a tribunal established under the Australia-Hong Kong BIT in 1993 gave rise to considerable controversy in that country.[19]

Last but not least, UNCTAD's "Road Map for IIA Reform" stresses that international investment agreements reform should aim at:

— safeguarding the right to regulate in the public interest to ensure that international investment agreements (IIAs) limits on the sovereignty of States do not unduly constrain public policymaking;

— reforming investment dispute settlement to address the legitimacy crisis of the current system.

Accordingly, the reform or the ISDS must go hand in hand with the reform of the substantive investment protection rules embodied in IIAs.

II. Controversies caused by the intra-EU BITs

Following the entry into force of the Treaty of Lisbon, foreign direct investment has been included in the list of matters falling under the common commercial policy (CCP). In addition, in accordance with Article 3(1)(e)TFEU, the EU has exclusive competence with respect to the CCP. Accordingly, only the Union may legislate and adopt legally binding acts within that area. The Member States are able to do so themselves only if so empowered by the Union, in accordance with Article 2(1) TFEU. At the time of the entry into force of the Treaty of Lisbon, Member States maintained a significant number of bilateral investment agreements with third countries. So far, Member States have been empowered by Regulation (EU) No 1219/2012 of 12 December 2012 to maintain temporarily their bilateral investment agreements concluded with third countries that were signed between 1 December 2009 and 9 January 2013.[20] These extra-EU BITs will be progressively replaced by agreements of the EU relating to the same subject matter. Conversely, secondary law does not deal with bilateral investment treaties concluded between two Member States.

The internal-EU BITs concluded prior to the accession of the 10 new Member States in 2004–2007 lay at the root of various controversies.[21] In the aftermath of the accession, the European Commission started to dispute the maintenance of these agreements.

In effect, the substantive provisions of the BITs, including the ISDS clauses, could be considered to be discriminatory in affording preferential treatment to investors from the states of origin who have invested in the host state, whereas the investors of the Member States that had not concluded a BIT with the host state did not benefit from such treatment. Whether that difference of treatment is compatible with Article 18 TFEU, which prohibits discrimination on the ground of nationality, remains to be seen.

[19] The claim was based on the alleged effect on investments of the enforcement by the Government of the Tobacco Plain Packaging Act 2011. The Australian case was adjudicated under the Australia-Hong Kong BIT from 1993. Philip Morris actually incorporated in Hong Kong to make use of that BIT ISDS when it became obvious that Australia would introduce legislation on plain cigarette packaging. See also *Philip Morris Brands Sarl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*, ICSID Case No ARB/10/7 (formerly *FTR Holding SA, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay*), Award (8 July 2016).

[20] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012, establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJEU L/351.

[21] P Strik, *Shaping the Single European Market in the Field of Foreign Direct Investment* (Cambridge, CUP 2014) 218–19.

In addition, given that the investors' rights stemming from the BITs are broader than the free movement of services and capital, the functioning of the internal market is likely to be jeopardised.

Last but not least, the added value for the EU of the ECT mentioned above has been reduced by EU harmonisation in the energy sector.[22]

1. The positions of the Member States and European Commission

Member States have divided into two groups. On the one hand, the Member States that are essentially countries of origin for the investors, and therefore never or rarely respondents in arbitral proceedings launched by investors (Germany, France, the Netherlands, Austria and Finland) support the validity of intra-EU BIT in general and ISDS in particular. [23]

On the other hand, a number of Central European (Czech Republic, Hungary, Poland, Romania and Slovakia) and Baltic countries (Estonia and Latvia), as well as Cyprus, Greece and Italy have been respondents in a number of arbitral proceedings relating to intra-EU investments.[24] Accordingly, they have taken the view that intra-EU BITs are incompatible with the TEU and TFEU.

This opposition mirrors the fact that the majority of intra-EU BITs were concluded between market-economy countries and countries that previously had command economies.[25]

Available UNCITRAL statistical data indicate that investors from EU Member States have initiated proceedings before ISDS more frequently than other investors. At the same time, EU Member States are frequently respondents in investment disputes. The significant differences between the Member States that are respondents and those whose investors are claimants in investment disputes (EU Member States as home states) explain the existing diverging views between EU Member States with respect to investment issues.

EU Member States	Cases as Respondent State	Cases as Home State of claimant
Austria	1	17
Belgium	2	16
Bulgaria	8	0
Croatia	8	3
Cyprus	4	22
Czech Republic	35	4
Denmark	0	5
Estonia	4	1
Finland	0	2
France	1	41

22 M Roggenkamp, C Redgwell, A Ronne, and I del Guayo (eds.), *Energy Law in Europe. National, EU and International Regulation*, 3rd edn (Oxford, Oxford University Press 2016).

23 Opinion of AG M Wathelet, para. 35.

24 Opinion of AG M Wathelet, para. 35.

25 Only two BITs have been concluded between the old Member States (EU15): Germany – Greece BIT (1961) and Germany – Portugal BIT (1980).

(Continued)

EU Member States	Cases as Respondent State	Cases as Home State of claimant
Germany	3	57
Greece	4	14
Hungary	14	1
Ireland	0	1
Italy	9	34
Latvia	8	2
Lithuania	5	3
Luxembourg	0	37
Malta	0	2
Netherlands	0	96
Poland	24	7
Portugal	0	5
Romania	13	1
Slovakia	13	1
Slovenia	3	2
Spain	36	43
Sweden	0	8
UK	1	69

Source: UNCTAD, December 2017

Despite these controversies, the Member States maintained the BITs, either in whole or in part, with the exception of the Italian Republic which has terminated its intra-EU BITs.

At the outset, the European Commission took the view that the intra-EU BITs were necessary in order to prepare for accession to the Union by the countries of Central and Eastern Europe, which occurred in 2004–2007. More recently, in a number of pre-*Achmea* intra-EU disputes under the ECT, the Commission has intervened as an *amicus curiae* in support of respondent Member States that have raised an intra-EU jurisdictional objection.

The arguments proposed by the Commission have not generally been accepted by arbitral tribunals. Various arbitral tribunals have held that disputes between investors and states parties to a BIT do not fall within the ambit of Article 344 TFEU. For example, whereas in the *Charanne* case the European Commission had objected in its *amicus curiae* to the jurisdiction of the arbitral tribunal apprised of the matter, the latter ruled that it did indeed have jurisdiction.[26]

In addition, tribunals generally take the view that, even if EU law has to be applied, there is no conflict between the investment treaty and EU law.

By way of illustration, in *Electrabel* the tribunal agreed that EU law was applicable to the dispute: "The Tribunal further concludes that EU law (not limited to EU Treaties) forms part of the rules and principles of international law applicable to the Parties' dispute under Article 26(6) ECT. Moreover EU law, as part of the Respondent's national law, is also to be taken into account as a fact relevant to the

[26] *Charanne BV and Construction Investments Sàrl v Kingdom of Spain* (SCC Case No 062/2012) Final Award of 21 January 2016, para. 409.

Parties' dispute".[27] However, the tribunal concluded in the following paragraph that there was in this case no material inconsistency between the ECT and EU law.[28]

Is ISDS threatening the level of protection afforded to consumers, the environment and private individuals by the EU and the Member States? Do intra-EU BITs represent a risk to the uniformity and effectiveness of EU law? In his Opinion, AG Melchior Wathelet emphasised that UNCTAD's statistics show that, out of 62 intra-EU arbitral proceedings concluded over a period of several decades, investors have only been successful in 10 cases.[29]

III. The judgment

Within the context of a reform of its health system, the Slovak Republic opened up the domestic market in 2004 to national and foreign operators offering private sickness insurance services. Achmea established a subsidiary in Slovakia through which it offered private sickness insurance. Following a change of government in 2006, the Slovak Republic partly revoked the liberalisation of the sickness insurance market. It prohibited the intervention of insurance brokers, the distribution of the profits from sickness insurance activities and also the sale of insurance portfolios. Taking the view that this regulatory change breached several provisions of the Netherlands-Czechoslovakia BIT, Achmea initiated arbitral proceedings against Slovakia.

Achmea claimed that, by banning the transfer and distribution of profits, the Slovak Republic had breached the BIT requirements of fair and equitable treatment and the obligation to allow the free transfer of payments.

The arbitral tribunal, which had its seat in Frankfurt am Main, rejected the objection to its jurisdiction and declared that it had jurisdiction. By a Final Award of 7 December 2012, the arbitral tribunal held that some of the measures adopted by the Slovak Republic, namely the ban on the distribution of profits and the ban on transfers, breached the provisions on fair and equitable treatment and the free transfer of payments under the BIT and ordered the Slovak Republic to pay Achmea damages of €22.1 million. As the seat of the arbitration was Frankfurt am Main, the Slovak Republic brought an action seeking to reverse the Final Award before the Higher Regional Court of Frankfurt am Main. Slovakia argued that the Final Award should be reversed because it was contrary to public policy. In particular, Slovakia claimed that the arbitral tribunal had been unable to request the Court of Justice to issue a preliminary ruling under Article 267 TFEU. Accordingly, the tribunal had failed to take account of the Treaty provisions on the free movement of capital.

In fine, given that the Bundesgerichtshof (Federal Court of Justice) had expressed doubts concerning the compatibility of the BIT with Articles 267 and 344 TFEU and with the principle of non-discrimination set forth in Article 18 TFEU, it referred the questions for preliminary ruling.

One of the bones of contention was Article 344 TFEU. That provision provides that "Member States undertake not to submit a dispute concerning the interpretation or

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[27] *Electrabel SA v Hungary* (ICSID Case No ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012 and Award of 25 November 2015, para. 4.195.

[28] Para. 4.196.

[29] Opinion of AG M Wathelet, para. 44.

application of the Treaties to any method of settlement other than those provided for therein". The German Federal Court of Justice expressed doubts as to the compatibility of Article 8 of the Netherlands-Czechoslovakia BIT with Article 344 TFEU, insofar as the wording of the latter provision did not make it clear that it covered disputes between an individual and a Member State. AG Melchior Wathelet dismissed a broad interpretation of Article 344 TFEU. According to him, disputes between individuals do not come under Article 344 TFEU, even if the court called upon to settle them is led to take EU law into account or to apply it.[30] In support of his argument, AG Wathelet referred to Opinion 2/13 (Accession of the Union to the ECHR) of 18 December 2014.[31] In paragraphs 201–214 of that Opinion, the Court examined, from the perspective of Article 344 TFEU, only disputes between Member States and disputes between Member States and the Union.[32]

In line with its Opinion 2/13 on the adhesion of the EU to the ECHR, the CJEU stressed the autonomy of the EU legal order with respect to the domestic law of the Member States and international law. This autonomy is "justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law".[33] EU law is founded upon a set of common values, as is stated in Article 2 TEU. According to the Court, this fundamental premise "implies and justifies the existence of mutual trust between the Member States".[34]

In particular, the preliminary ruling procedure provided for in Article 267 TFEU is the "keystone" of the EU judicial system.[35] The object of that procedure is to secure the "uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties".[36]

Starting from these premises, the Court of Justice answered the questions referred for a preliminary ruling in three stages.

1. Is EU law likely to be interpreted and applied?

First, the Court was required to verify whether the tribunal was called on to rule only on possible infringements of the Dutch-Slovak BIT, or whether it was likely to deal with issues of EU law. Although the arbitral tribunal had to rule on the case in light of investment rights, it nevertheless "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".[37]

It must be noted that EU law had to be taken into consideration on the grounds that, according to Article 8(6) of the BIT, the tribunal had to take account in particular of "the law in force of the contracting party concerned and other relevant agreements between

[30] Opinion of AG M Wathelet, para. 146.

[31] Opinion 2/13 (accession to the ECHR), 18 December 2014, EU:C:2014:2454.

[32] Opinion 2/13, paras. 201–214.

[33] *Achmea*, para. 33.

[34] *Achmea*, para. 34.

[35] *Achmea*, para. 37.

[36] *Achmea*, para. 37. See also Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU: C:2014:2454, para. 176 and the case law cited therein.

[37] *Achmea*, para. 42.

the contracting parties".[38] However, as discussed below, the obligation to take into consideration the domestic law of the state party is not required under all BITs. By way of illustration, according to Article 26(6) of the European Energy Charter, the tribunal shall decide the disputes in accordance with this treaty and applicable rules and principles of international law. It may be inferred that tribunals established under the terms of these treaties cannot rule in accordance with national law.

2. Can the arbitral tribunal be regarded as a "court or tribunal of a Member State" within the meaning of Article 267 TFEU?

Given that EU law was applicable, the CJEU had to ascertain whether the tribunal was part of the "judicial system of the EU". In that respect, the CJEU did not follow the opinion of AG Melchior Wathelet. The CJEU took the view that the tribunal at issue could not in any event be classified as a court or tribunal "of a Member State" within the meaning of Article 267 TFEU.[39] In this regard it stressed the *raison d'être* of these arbitral tribunals, which had an "exceptional nature" compared with that of the national courts. Consequently, the tribunal instituted under the Netherlands-Slovakia BIT is not part of the "judicial system" of the contracting parties.[40] The criterion of "establishment by law" prevails over other criteria such as permanent and compulsory jurisdiction, independence, application of rules of law, and adversarial procedure.[41] It is beyond doubt that the arbitral tribunal originated from a treaty and not an arbitration agreement contained in a contract.

The CJEU was careful to distinguish between the BIT arbitral tribunal and commercial arbitration tribunals, the awards of which can be subject to limited review by the national courts. Indeed, the domestic courts can verify whether the fundamental provisions of EU law have been respected and, if necessary, refer questions to the CJEU for a preliminary ruling.[42]

When confronted with the issue as to whether a tax tribunal in Portugal (Tribunal Arbitral Tributário) could refer questions for a preliminary ruling in accordance with Article 267 TFEU,[43] the CJEU derived the status as a "court or tribunal of a Member State" of the tribunal in question from the fact that the tribunal as a whole was part of the system for the judicial resolution of tax disputes provided for by the Portuguese constitution itself.[44]

The Court took also the view that the investment arbitral tribunal at issue was not akin to a court common to the two Member States ruling in the same way as the courts or tribunals of any one of the Member States. It referred to the Benelux Court of Justice that has "the task of ensuring that the legal rules common to the three Benelux States are applied uniformly, and the procedure before it is a step in the proceedings before the national courts leading to definitive interpretations of common Benelux legal rules".

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[38] *Achmea*, para. 40.

[39] *Achmea*, para. 46.

[40] *Achmea*, para. 45.

[41] Case C-394/11 *Belov* EU:C:2013:48, para. 38.

[42] *Achmea*, para. 44.

[43] Case C-377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* EU:C:2014:1754.

[44] *Achmea*, para. 44.

By contrast, the arbitral tribunal at issue "does not have any such links with the judicial systems of the Member States".[45]

3. Review of the arbitral award by the courts of the Member State

In a third stage, the Court was required to verify whether the national court charged with reviewing the validity of the arbitral award could itself refer a question for a preliminary ruling, as had occurred in the case before it.

With respect to commercial arbitration, the CJEU has already ruled that, "where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with EU rules of this type".[46]

However, judicial review can only be exercised by the tribunal instituted by the Netherlands-Slovakia BIT "to the extent that national law permits".[47] Furthermore, the German Code of Civil Procedure provides only for limited review.[48] Although the requirements of efficient arbitration proceedings justify the review of arbitral awards by the courts of the Member States, as this is limited in scope, it is nevertheless necessary for the domestic court to examine the fundamental provisions during the course of that review. This condition was not fulfilled. The CJEU stressed the key difference between BIT arbitration tribunal proceedings and commercial arbitration proceedings.

The commercial arbitration procedure originates in the "freely expressed wishes of the parties", whereas the investment arbitration at issue stems from a bilateral 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 requires them to establish in the fields covered by EU law".[49]

The possibility granted to a state court to refer questions for a preliminary ruling within the ambit of a limited review by the courts of commercial arbitration cannot therefore be transposed to investment arbitration.

IV. Commentary

It is now necessary to address the impacts the annotated judgment is likely to have on BITs and investment proceedings. Five separated, albeit related, questions must be distinguished. The first concerns the implications of the judgment for intra-EU BITs. Related to this is the issue of its implications for extra-EU BITs. Closely related to the issue of the validity of the intra and extra-EU BITs is the issue of the 86 pending arbitrations between investors from one Member State and another Member State under intra-EU BITs and other treaties incorporating investment protection. The fourth

[45] *Achmea*, para. 43.

[46] Case C-126/97 *Eco Swiss* EU:C:1999:269, paras. 37, and Case C-168/05 *Mostaza Claro* EU:C:2006:675, paras. 34–39.

[47] *Achmea*, para. 53.

[48] ibid.

[49] *Achmea*, para. 55.

question relates to the implications of the judgment for BITs that do not allow arbitral tribunals to take national law into account. Last but not least, what deserves also attention is the effect of the judgment for the rights of investors.

1. Implications for intra-EU BITs

The preliminary rulings of the CJEU are not only binding on the courts involved in resolving the dispute that gave rise to the preliminary ruling (*inter partes*); they are also binding on other courts *erga omnes*. In other words, all other courts have to interpret the EU rules in accordance with the operative part and the *ratio* of the preliminary ruling.[50] The interpretation of the EU rule in question is part of the rule in question.[51]

Just as the preliminary reference procedure allows for a uniform interpretation of EU law, it is also indispensable in order to guarantee its uniform application by the national courts.[52]

It follows that the Member States that are contracting parties to an EU-internal are obliged to comply with the ruling in *Achmea* as of 6 March 2018. Therefore the proceedings under which an investor from one of those Member States may, in the event of a dispute concerning investments in another Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept, have become inapplicable.

In addition, the Member States that are parties to such agreements are required to denounce the arbitration clauses contained in the BITs as soon as possible. Furthermore, the maintenance of this dispute resolution mechanism will engage the responsibility of the Member States concerned. Finally, as the guardian of the treaties, the European Commission should initiate infringement actions in accordance with Article 258 TFEU against any Member States that are not willing to denounce these ISDS clauses.

Given that there are 181 intra-EU BITs in force, the *Achmea* judgment is likely to have a significant impact on these treaties. Almost all of these agreements have been concluded between old and new Member States.[53]

Finally, it should be noted that, following the entry into force of the Lisbon Treaty, Member States are no longer able to conclude internal BITs. However, where commercial and investment treaties cover matters falling under shared competence, including in particular portfolio investments,[54] such agreements are classed as mixed.

2. Implications for extra-EU BITs

There are 118 such treaties in force.[55] Although the *Achmea* case concerned an investment treaty concluded between two Member States, specifically the Netherlands

[50] Case 66/80 *SpA International Chemical Corporation*, aff, EU:C:1981:102, para. 13; Case 314/85 *Foto-Forst,* aff EU:C:1987:452.

[51] M Broberg and N Fenger, *Preliminary References to the European Court of Justice* (Oxford, Oxford University Press 2010) 442.

[52] ECJ, 3 May 1981, *SpA International Chemical Corporation*, aff 66/80, point 11.

[53] Only two BITs have been concluded between the old Member States (EU15): Germany – Greece BIT (1961) and Germany – Portugal BIT (1980).

[54] Opinion 2/15, EU-Singapore Agreement, para. 83.

[55] UNCTAD investment hub website, <investmentpolicyhub.unctad.org>.

and Slovakia, the implications of the judgment in question reach far beyond internal EU agreements. In fact, the dispute resolution mechanisms provided for under BITs concluded between Member States and third countries will also prove to violate Article 267 and 344 TFEU where the arbitral jurisdiction is liable to concern either the application or the interpretation of EU law.

It follows that the prohibition of ISDS clauses in such extra-EU BITs could compound the imbalance in relations with third countries. In other words, EU investors could be protected in third countries, but third country investors would not receive similar protection in the EU in any case involving an EU measure that is being implemented in national law. By way of illustration, a Belgian investor in China could initiate proceedings against the host state before an ISDS, given that EU law is inapplicable. However, a Chinese investor in Belgium would be unable to avail itself of the same right on the grounds that the tribunal could interpret and even apply EU law.[56]

An investment tribunal could always argue that ISDS cannot be excluded on the ground that the case does not concern either the application or the interpretation of EU law as the subject-matter has not been harmonised. Considering the sheer breath of EU harmonisation in the energy, transport, industrial, agricultural, trade in goods and in services and financial services sectors, it seems to us that this would be much more than a mere theoretical hypothesis.

Finally, considering the changes that have been made to Article 207 TFEU, these extra-EU BITs will eventually disappear as the EU concludes new investment treaties with third countries.[57] Indeed, these new bilateral treaties prevail over the former extra-EU BITs. It must be noted, however, that the TFEU does not contain any explicit transitional provisions for such agreements which have now come under the Union's exclusive competence regarding direct investment. Currently, the EU is negotiating trade agreements including investment protection with India, Indonesia, Japan, Malaysia, Mexico, China and Myanmar.

3. Implications for pending arbitrations

There are 86 pending arbitrations between investors from one Member State and another Member State under intra-EU BITs and other treaties incorporating investment protections, including pending intra-EU arbitrations under the Energy Charter Treaty. Out of this number, 37 are pending intra-EU arbitrations under intra-EU BITs. Moreover, several arbitration proceedings, such as the one in *Vatenfall*, have been fraught with controversies.[58]

[56] Belgium-China Bilateral Investment Treaty of 6 June 2005.

[57] Preamble, no 5, Regulation no 1219/2012 (footnote 21).

[58] The Swedish company Vattenfall objected, pursuant to the ISDS provisions of the ECT, to the decision taken by Germany to phase out nuclear power plants. The challenge, which has been filed with the ICSID in Washington, has not yet been ruled upon. See *Vattenfall AB v Federal Republic of Germany (II)*, ICSID Case No ARB/12/12 (*Vattenfall II*). See N Bernasconi, *Background Paper on Vattenfall v Germany Arbitration*, IISD, 2009, p 4–5; N Bernasconi-Osterwalder and RT Hoffmann, "The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the New Dispute Vattenfall v Germany (II)", IISD, 2012, p 5; F Romanin Jacur, "The Vattenfall v. Germany Disputes: Finding a Balance Between Energy Investments and Public Concerns" in J Levashova, T Lambooy and E Dekker (eds), *Bridging the Gap between International Investment Law and the Environment* (Den Haag, Eleven Publishing 2016) 339.

The fact that Articles 267 and 344 TFEU preclude the arbitration clauses provided for under internal EU BITs raises a number of questions. As they have the status of *res judicata*, decisions given by arbitral tribunals cannot be challenged, as this would entail a violation of the principle of legal certainty.[59]

It would appear that, owing to the primacy that must be afforded to the judgments of the Court of Justice, the Member States should put an end to such proceedings, even if there may be concerns that some arbitral tribunals might not accept this position. In effect, as has been seen in the past, various arbitral tribunals have rejected both the primacy of EU law as well as the autonomy of the EU legal order. They could therefore continue to hear any cases that were brought before them before 6 March 2018.

The respondent, namely the Member State that is a party to the BIT, risks not being able to exercise its rights to a defence. But will the consequences be as dramatic as might be feared?

Whenever the award is granted by an arbitration tribunal that has its seat in a Member State, the respondent Member State should object to its jurisdiction and request the domestic court reviewing the award to refer questions for preliminary ruling to the CJEU.

However, such reasoning will not apply in the following two types of arbitration. Firstly, with respect to UNCITRAL arbitrations in which the seat of arbitration is outside of the EU Member States, the domestic court could review whether the award breaches a public policy interest. However, it cannot annul the arbitration award on the grounds that the award was based on the failure to comply with national rules on public policy due to the fact that it is in breach of EU law. In addition, the public policy exemption under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is construed very narrowly.[60] Secondly, with respect to ICSID arbitrations that are guided by the ICSID Convention, the arbitral award cannot be challenged before any court. ICSID awards are final and binding.[61]

4. Implications for BITs that do not allow arbitral tribunals to take national law into account

The Court's reasoning concerning the potential applicability of EU law to this type of dispute runs counter to the position adopted by numerous arbitral tribunals according to which Union law is not applicable where the BIT does not allow the arbitral tribunal to consider national law, or only allows it to apply national law as a matter of fact.[62]

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[59] Case C-126/97 *Eco Swiss*, EU:C:1999:269.

[60] The grounds prescribed in Art V of the New York Convention can be summarised as follows: grounds related to procedural justice, such as incapacity of parties (Art V(1)(a)); lack of proper notice or other inability of the party to present the case (Art V(1)(b)); the award is beyond the scope of arbitration (for example, excess of mandate or power) (Art V(1)(c)); irregularities in the composition of the arbitral tribunal (Art V(1)(d)); the award is suspended under the law of the country in which it was made (Art 1(V)(e)); and grounds related to substantive reasons, such as public policy grounds (Art V(2)). These grounds are also incorporated into the UNCITRAL Model Law on International Commercial Arbitration in Art 36(1).

[61] Art 53 of the ICSID Convention.

[62] Q Declève and I Van Damme, "Achmea: Potential Consequences for CETA, the Multilateral Investment Court, Brexit and other EU trade and investment agreements", *International Litigation Blog*, 13 March 2018.

In accordance with Article 8(6) of the Netherlands-Slovakia BIT, the tribunal has to take into account "the law in force of the Contracting Party concerned", as well as the provisions of the BIT.

However, other BITs do not mention any requirement to take domestic law into consideration. By way of illustration, Article 26(6) of the ECT does not explicitly mention domestic law as the applicable law in investment arbitration:

> "6. A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law."

Under Article 8.31.2 CETA "in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of the disputing Party as a matter of fact".

Could such a difference be invoked by arbitration tribunals in order to distinguish the proceedings under the ECT and other BITs from *Achmea* on the grounds that these investment treaties do not explicitly mention domestic law? Investment lawyers take the view that arbitration tribunals do not apply domestic law but exclusively international law. This author, however, considers that such an interpretation would be incorrect as domestic law should also be applicable, alongside international law.

In our view, the power granted under the BIT to the arbitral tribunals to take account, where appropriate, of the internal law of the party concerned "as a matter of fact"[63] does not preclude the potential applicability of EU law. It must be recalled that disputes concerning investor protection that are brought before arbitral tribunals generally concern national regulatory measures and not individual acts. Such regulatory measures restrict the exercise of the rights that have been granted to claimants. The examination as to whether these rights have been violated by a regulatory measure is anything other than a matter of fact. It necessary leads the arbitral tribunal to consider its scope and, as the case may be, to state its views concerning its compatibility with EU law. The fact that the arbitral tribunal is called upon to follow the interpretation considered to be dominant does not change the position. This means that any objection that such regulatory measures deprive investors of the rights vested in them by the investment treaty is likely to result in the interpretation or even application of EU law by the arbitral tribunal.

Furthermore, it should be noted that several BITs provide that arbitral tribunals must rule in accordance not only with the treaty in question but also with the applicable rules and principles of international law.[64] It follows that tribunals must rule in accordance with the provisions of EU law insofar as these form part of international law. Incidentally, in the *Electrabel* case the arbitral tribunal confirmed the relevance of the

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[63] In *Electrabel*, the Tribunal took the view that: "when it is not applied as international rules under the ECT, EU law must in any event be considered as part of the Respondent's national legal order, i.e. to be treated as a 'fact' before this international tribunal" (4.127). "The importance of rules contained in a national legal order, as a factual element to be taken into account, has long been acknowledged by international tribunals" (4.128). A similar approach was later endorsed by the ICSID tribunal in *El Paso v The Argentine Republic* (*El Paso Energy International Company v The Argentine Republic* (ICSID Case No ARB/03/15) (US/Argentina BIT), Award of 31 October 2011, paras. 135 and 141). The Tribunal held that: "where a binding decision of the European Commission is concerned, even when not applied as EU law or international law, EU law may have to be taken into account as a rule to be applied as part of a national legal order, as a fact" (4.129).

[64] Art 26(6) ECT.

Commission's theory according to which EU law forms part "of the rules and principles of international law applicable to the Parties' dispute under Article 26(6) ECT".[65] Therefore, EU law prevails not only from the perspective of EU law, but also from the perspective of international law.

Finally, Article 42(1) of the ICSID Convention, which applies to ICSID arbitrations, provides that: "In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".

5. Implications for the rights of investors

Whilst the Court of Justice may have called into question the dispute resolution mechanism provided for under BITs, the various rights granted to investors under these treaties nonetheless remain valid. Absent any power to bring their dispute before an arbitral tribunal, nothing prevents them from invoking their rights before the national courts. Various arbitral tribunals and state courts have held that BITs grant rights directly to investors,[66] which is not the case for a treaty such as the CETA.[67] As the CJEU stressed in *Achmea*, in accordance with the principle of sincere cooperation enshrined in Article 19 TEU, it is for the national courts and tribunals to ensure the full application of EU law in all Member States and to ensure consistency and uniformity in the interpretation of EU law.[68]

Nevertheless, there have been calls from some quarters for the adoption by the EU institutions of a regulation incorporating the rights granted to investors under the BITs. Several lawyers took the view that the *Achmea* amounts to a retrograde step.[69] It must be noted once again that, as far as the receipt and protection of investments is concerned, the general level of protection of fundamental rights provided for under EU law protects investors who respect the obligations resulting from Articles 10(1) and 13(1) of the Energy Charter Treaty. However, this author considers that the enshrinement of a right within a Union act granting compensation to investors in the event of indirect expropriation would be of questionable benefit as the case law of the European Court of Human Rights does not oblige the Member States to provide for such compensation.[70]

V. Conclusions

All the investment treaties concluded in the course of the 1990s between the "old" and the "new" Member States establish a mechanism for settling disputes between an investor and the host Member State. These mechanisms prevent those disputes from

[65] Para. 4.195. See E Bonafé and G Mete, "Escalated interactions between EU energy law and the Energy Charter Treaty" (2016) 9(1) The Journal of World Energy Law and Business 174, 177–179.

[66] See the case law quoted in the Opinion of AG M Wathelet, para. 156.

[67] Art 30.6.1.

[68] *Achmea*, para. 35.

[69] N Lavranos, "After Achmea: the need for an EU investment protection regulation", *Kluwer Arbitration Blog*, 17 March 2018.

[70] So far, the ECtHR dealt with cases amounting to quasi-expropriation. See *Zubani* of 7 August 1996 confirmed by the judgments of 30 May 2000, *Belvedere Alberghiera v Italy* and *Carbonara and Ventura v Italy*.

being resolved in a manner that ensures the full effectiveness of EU law. In effect, the arbitral tribunals cannot limit themselves to applying the provisions of BITs. They must take account of the law of the contracting state party to the dispute and such rules of international law as may be applicable. It follows that these disputes may relate to the interpretation both of that agreement and of EU law. However, given that such arbitration tribunals cannot be regarded as a "court or tribunal of a Member State" within the meaning of Article 267 TFEU, it is not therefore entitled to make a reference to the Court of justice for a preliminary ruling.

Consequently, the CJEU held that Articles 267 and 344 TFEU must be interpreted as precluding dispute settlement mechanisms. Accordingly, the CJEU endorses a broad interpretation of Article 344 TFEU. Furthermore, the annotated case builds on Opinion 2/13 regarding accession to the ECHR.

Even if certain dispute resolution mechanisms could prove to be compatible with EU law where the rules of civil procedure provide for a broad measure of control over the recognition and enforcement of the arbitral award,[71] the fact remains that BITs applicable within the Union will continue to raise problems of discrimination between different investors. It will thus fall to the civil courts reviewing the awards to send preliminary references to the Court of Justice concerning the compatibility of these treaties with Article 18 TFEU. In fact, the Court was not required to rule on this issue in the *Achmea* case.

Finally, the position adopted by numerous arbitral tribunals according to which Union law is not applicable where the BIT does not allow the arbitral tribunal to consider national law, or only allows it to apply national law as a matter of fact, is incorrect. Disputes concerning investor protection that are brought before arbitral tribunals generally concern national regulatory measures that limit the exercise of the rights granted to investors. This means that any objection raised against such regulatory measures is likely to result in the interpretation or even application of EU law by the arbitral tribunal.

To conclude with, the judgment has thrown into relief the preemption of the EU legal order over the commitments that individual Member States – and the EU itself in the case of the ECT – have entered into it.[72]

[71] However, this appears to be unlikely as the lack of any grounds for challenge (see Art 53 of the ICSID Convention) or of extensive control represents precisely one of the advantages of international arbitration.

[72] H Schepel, "From Conflicts-Rules to field Preemption: Achmea and the Relationship between EU Law and International Investment Law and arbitration", *European Law Blog*, 23 March 2018.