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XXXIX POLISH YEARBOOK OF INTERNATIONAL LAW

2019 DOI 10.24425/pyil.2020.134482

PL ISSN 0554-498X

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THE IMPACT OF *ACHMEA* ON INVESTOR-STATE ARBITRATION UNDER INTRA-EU BITS: A TREATY LAW PERSPECTIVE

Abstract: *This article examines the consequences of the Court of Justice of the European Union's (CJEU) ruling in Achmea concerning Investor-State Arbitration (ISA) under intra-EU Bilateral Investment Treaties (BITs) from a treaty law perspective. It begins by briefly setting out the arguments of Advocate General Wathelet and the CJEU supporting their different positions on whether intra-EU BITs ISA clauses are compatible with EU law. The article then proceeds to analyse Achmea's implications for intra-EU BIT ISA. It concludes that, as a result of the CJEU's ruling, arbitral tribunals are deprived of their jurisdiction to entertain investors' claims brought under intra-EU BIT ISA clauses. Finally, the article argues that Achmea's applicability to cases brought under intra-EU BIT ISA clauses is limited, using the application of EU law as a relevant qualification. In order for an arbitral tribunal to be deprived of its jurisdictional competence as a result of Achmea, it must be entitled to interpret and apply EU law directly or indirectly in determining its jurisdiction.*

Keywords: Achmea, arbitral tribunal, intra-EU BITs, Investor State Arbitration, jurisdiction

INTRODUCTION

In its decision of 6 March 2018 in *Slovak Republic v. Achmea BV*[1] (*Achmea*), the Court of Justice of the European Union (CJEU or Court) held that an Investor-State Arbitration (ISA) clause in an international agreement between EU Member States, such as the one included in the Netherlands – Slovak Republic Bilateral Investment Treaty

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[1] Case C-284/16 *Slovakische Republic v. Achmea BV* [2018] ECLI:EU:C:2018:158.

(BIT), was incompatible with Arts. 267 and 344 of the Treaty on the Functioning of the European Union (TFEU).

It has been two years since the CJEU rendered its judgment in *Achmea*, yet only recently has its impact on intra-EU ISA started to unfold. In *Achmea*'s aftermath, there has been a significant debate among EU and international law scholars, as well as among practitioners and arbitral tribunals, regarding the consequences of the Court's ruling on investor-state arbitration under both intra-EU BITs, as well as on mixed agreements such as the Energy Charter Treaty (ECT). For some, *Achmea* is bound dramatically to alter the landscape of investment arbitration on the basis not only of intra-EU BITs but of mixed agreements as well. Yet, others remain more sceptical and abstain from making predictions regarding the decision's possible outreach and effects.

This article examines what the CJEU's ruling in *Achmea* entails for investor-state arbitration under intra-EU BITs from a treaty law perspective. It begins by briefly setting out the arguments of Advocate General (AG) Wathelet and the CJEU supporting their differing positions on whether intra-EU BIT ISA clauses are compatible with EU law. The article then proceeds to analyse *Achmea*'s implications for intra-EU BIT investor-state arbitration using a treaty law analysis. In this regard it concludes that as a result of the CJEU's ruling arbitral tribunals are deprived of their jurisdiction to entertain investors' claims brought under intra-EU BIT ISA clauses. Finally, the article argues that *Achmea*'s applicability to cases brought under intra-EU BIT ISA clauses is limited and uses the application of EU as a relevant qualification; for an arbitral tribunal to be deprived of its jurisdictional competence as a result of *Achmea*, it must be entitled to interpret and apply EU law directly or indirectly in determining its jurisdiction.

1. THE TWO FACES OF JANUS: EXPLORING THE ACHMEA SAGA

In March 2016, the German Federal Court of Justice (*Bundesgerichtshof)* submitted to the CJEU a request for a preliminary ruling[2] in the course of an action for the annulment of a Permanent Court of Arbitration's (PCA) final award in *Achmea v. the Slovak Republic*.[3] Achmea, an undertaking belonging to a Dutch insurance group, had initiated arbitral proceedings under UNCITRAL against Slovakia based on the Netherlands and Czech and Slovak Republic BIT (Netherlands-Slovak Republic BIT), claiming damages. In the proceedings before the tribunal, Slovakia challenged the latter's jurisdiction to hear the dispute on the grounds that the ISA clause of the applicable intra-EU BIT was incompatible with EU law. The tribunal rejected the objection to its jurisdiction, proceeded to adjudication of the dispute on the merits and awarded

[2] *See* Decision of the German Federal Court of Justice (*Bundesgerichtshof*) dated 3 March 2016, available at: https://bit.ly/3iyHegv (accessed 30 June 2020).

[3] *Achmea B.V. v. the Slovak Republic (former Eureko B.V.),* Case No 2008-13, Final Award of 7 December 2012.

damages to *Achmea*, as it found Slovakia to be in breach of its obligations under the BIT. Following the tribunal's award, Slovakia brought proceedings before the Higher Regional Court in Frankfurt am Main, the latter being the seat of arbitration, claiming that the ISA clause of the applicable intra-EU BIT was incompatible with Arts. 18(1),[4] 267[5] and 344[6] TFEU. The Commission intervened in both the proceedings before the arbitral tribunal and in the annulment proceedings before the German courts, supporting Slovakia's argument. The request for annulment was dismissed in the first instance proceeding and Slovakia lodged an appeal against that decision before the *Bundesgerichtshof*. In the light of the Commission's position throughout the proceedings and in order for the CJEU to be able to weigh in on the compatibility of intra-EU BIT ISA clauses with EU law, the *Bundesgerichtshof* decided to refer three questions to it under Art. 267 TFEU, namely, first, whether Art. 18(1) TFEU precluded the application of an intra-EU BIT provision under which an investor of a contracting Member State could bring proceedings against another EU Member State before an arbitral tribunal; secondly, if Art. 344 TFEU could be interpreted as precluding the application of such provision; and finally, whether the application of an ISA clause could be precluded under Art. 267 TFEU.[7]

In September 2017, AG Wathelet delivered an opinion on the case, concluding that all three questions needed to be answered in the negative. First, he rejected the argument that intra-EU BIT ISA clauses were incompatible with Art. 18(1) TFEU. Drawing a parallel to the CJEU's approach in *D.*,[8] the AG considered the situation of EU investors covered under an intra-EU BIT not to be comparable to that of investors in Member States that are not intra-EU BIT signatories. Consequently, there could be no prohibited discrimination against EU investors not offered a benefit that other EU

[4] Art. 18(1) TFEU provides that "[w]ithin the scope of application of the Treaties, and without prejudice to any special provision contained therein, any discrimination on grounds of nationality shall be prohibited.'

[5] According to Art. 267 TFEU, "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

Where such a question is raised before in a case pending before a court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give the judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court [...]."

[6] Under Art. 344 TFEU, "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."

[7] Case C-284/16 *Slowakische Republic v. Achmea BV* [2017] ECLI:EU:C:2017:699, Opinion of AG Wathelet, para. 30.

[8] Case C-376/03 *D.* [2005] ECR I-05821.This case dealt with the legality of a wealth tax allowance granted by the Dutch authorities to Belgian residents under the Belgium-Netherlands Convention for the avoidance of Double Taxation (DTC). In that case, the CJEU had held that it was an 'inherent consequence' of bilateral DTCs that the rights and obligations stemming therefrom only applied to residents in one of the two DTC contracting states.

investors enjoyed on the basis of an intra-EU BIT,[9] including the possibility to have recourse to an ISA clause.[10] On the referring court's second question, AG Wathelet took the view that Art. 344 only covers disputes instituted directly by an EU Member State against another Member State or against the Union itself, drawing argumentation from the CJEU's relevant case law.[11] In his view, an alternative dispute settlement mechanism between Member States and investors fell outside the scope of Art. 344 TFEU. Finally, AG Wathelet considered a tribunal set up under an ISA clause, such as the one of the applicable intra-EU BIT, to be a "court or tribunal of a Member State" in the sense of Art. 267 TFEU,[12] thus being able to refer preliminary questions to the Court.[13] Based on these considerations, AG Wathelet supported the compatibility of an ISA clause such as the one included in the Netherlands – Slovak Republic BIT with Arts. 18(1), 267 and 344 TFEU and proposed that the CJEU rule accordingly.[14]

However, the CJEU decided not to follow AG Wathelet's suggestions. In establishing the light under which it would scrutinise the compatibility of the intra-EU BIT ISA clause with EU law, the Court highlighted the constitutional characteristics of the EU, including the principle of mutual trust, acknowledging the crucial part that the EU's judicial system and the preliminary reference procedure are called upon to play in ensuring the consistency, uniformity, full effect and autonomy of the EU legal order.[15] On that basis, in its judgment of 6 March 2018 the Court ruled against the possibility of an intra-EU BIT ISA mechanism to harmoniously coexist with the provisions of EU law and, in particular with Arts. 267 and 344 TFEU.

The CJEU first examined the compatibility of an intra-EU BIT ISA clause with Art. 344 TFEU. The Court has been confronted several times with the question of whether an international agreement is incompatible with the EU treaties because of a dispute resolution mechanism that threatens the autonomy of the EU legal order.[16] The incompatibility of an intra-EU BIT ISA clause with Art. 344 TFEU presupposes that the tribunal established thereunder would be in a position to rule on issues pertaining to the interpretation and application of EU law. According to the Court, Art. 8(6) of the applicable Dutch-Slovak Republic BIT allowed for this, as it enabled the tribunal to take account

[9] *Achmea* (AG Wathelet), para. 71.

[10] *Opinion 2/15 Free Trade Agreement with Singapore* [2017] ECLI:EU:C:2017:376, para. 292; *Achmea* (AG Wathelet), para. 77.

[11] Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635; *Opinion 2/13 on the Accession to the ECHR* [2014] ECLI:EU:C:2014:2454, para. 208; H. Wehland, *Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?*, 58 International and Comparative Law Quarterly 297 (2009), p. 318; S. Ø. Johansen, *The Reinterpretation of TFEU Article 344 in Opinion 2/13 and the Potential Consequences,* 16 German Law Journal 169 (2015), p. 171; *Opinion 1/09 on the Creation of a Unified Patent Litigation System* [2011] ECLI:EU:C:2011:123, para. 63.

[12] *Achmea* (AG Wathelet), paras. 85, 89.

[13] *Ibidem,* para. 131.

[14] *Ibidem*, para 273.

[15] *Achmea* (CJEU), paras. 32-34, 37.

[16] *Opinion 2/13 on the Accession to the ECHR*, para. 208; *Commission v. Ireland*; Wehland, *supra* note 11, p. 318; Johansen, *supra* note 11, p. 171.

of EU law, both as part of Slovakia's domestic law and as an international agreement to which the contracting parties of the applicable intra-EU BIT are both signatories.[17]

Having established that the arbitral tribunal could be called upon to interpret and apply EU law, the CJEU sought subsequently to ascertain whether the tribunal could form part of the EU judicial system and, therefore, participate in the judicial dialogue with the Court through the preliminary reference procedure of Art. 267 TFEU.[18] The CJEU's case law has already established a consistent set of criteria that need to be met for a *forum* to be characterised as a "court or tribunal" under Art. 267 TFEU. Such characterisation takes place on a case-by-case basis,[19] essentially depending on the nature of the referring judicial body.[20] Given that the expression "court or tribunal" is an autonomous concept of EU law, the final word as to whether a judicial body meets these criteria rests with the Court.[21] In contrast to AG Wathelet's reasoning, the CJEU answered this question in the negative. The Court based its response on the fact that an arbitral tribunal established under an intra-EU BIT ISA clause was not one of a "Member State", as required under Art. 267 TFEU. Unlike the courts under review in *Parfums Christian Dior*,[22] *Miles*[23] and *Ascendi Beiras*,[24] the *Achmea* tribunal was found to lie outside the EU judicial system, as it was neither part of the intra-EU BIT signatories' judicial system nor did it have any links whatsoever with their judicial systems.[25] In this regard, the Court held that '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 Art. 8 of the BIT.'[26]

Since an arbitral tribunal established under an intra-EU BIT ISA clause could not directly refer preliminary questions to the CJEU under Art. 267 TFEU, the Court went on to ascertain whether intra-EU BIT disputes could be subjected to its review indirectly. This would be the case if an award issued by such an arbitral tribunal could

[17] *Achmea* (CJEU), para. 42.

[18] *Ibidem*, para. 43.

[19] Case C-394/11 *Belov* [2013] ECLI:EU:C:2013:48, para. 38; Case C-196/09 *Miles and others* [2011] ECR I-05105, para. 37 and further references there.

[20] The CJEU has on a number of occasions refused to answer preliminary questions referred by arbitral tribunals; *see* Case C-125/04 *Denuit and Cordenier* [2005] ECR I-00923; Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECR I-03055; and Case C-102/81 *Nordsee v. Reederei Mond* [1982] ECR I-01095. On the other hand, it has equally upheld its jurisdiction in cases where the referring tribunal was established by law, its decisions were binding on the parties and its jurisdiction was not dependent on the parties' agreement, Case C-555/13 *Merck Canada* [2014] ECLI:EU:C:2014:92, para. 18; Case C-377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* [2014] ECLI:EU:C:2014:1754, para. 28; Case C-109/88 *Danfoss* [1989] ECR I-03199, paras. 7-8.

[21] Case C-24/92 *Corbiau v. Administration des Contributions* [1993] ECR I-01277; P. Craig, G. De Búrca, *EU Law: Texts, Cases and Materials* (6th ed.), Oxford University Press, Oxford: 2015, p. 466.

[22] Case C-337/95 *Parfums Christian Dior v. Evora* [1997] ECR I-06013, para. 21.

[23] *Miles*, paras. 40-41.

[24] Case C-377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* [2014] ECLI:EU:C:2014:1754, para. 28.

[25] *Achmea* (CJEU), paras. 45-49.

[26] *Ibidem*, para. 45.

subsequently be subjected to the review of the Member States' domestic courts, which could then refer questions to the Court.[27] However, in investor-state arbitration it is the applicable BIT and arbitration rules, as well as the domestic law of the tribunal's seat, that determine whether and to what extent judicial review of the arbitral award is an option. Consequently, there could be cases where an arbitral award would either completely escape judicial review by the Member States' domestic courts or such review would be limited, depending on the applicable national rules. Insofar as disputes falling within the jurisdiction of intra-EU BIT arbitral tribunals may relate to the interpretation or application of EU law while the dispute resolution mechanism provided therein could prevent them from being submitted to the CJEU, the Court found such a dispute resolution mechanism to have an adverse effect on the autonomy of EU law.[28] Based on the above, the CJEU concluded that an ISA clause included in an *inter se* agreement of the Member States was incompatible with Arts. 267 and 344 TFEU.[29]

2. THE LEGAL CONSEQUENCES OF ACHMEA ON INTRA-EU BIT INVESTOR-STATE ARBITRATION

Despite the fact that it has been two years since *Achmea* was delivered, its legal consequences on investor-state arbitration under intra-EU BITs remain to a great extent unclear, with EU and public international law scholars and practitioners, as well as national courts and tribunals, still arguing over the ruling's potential outreach.[30] To some,

[27] *Ibidem*, para. 50.
[28] *Ibidem*, para. 59.
[29] *Ibidem.*
[30] *See, inter alia*, M. Fanou, *Intra-European Union Investor-State Arbitration post-Achmea: RIP? An Assessment in the Aftermath of the Court of Justice of the European Union, Case C-284/16, Achmea, Judgment of March 6 2018, EU:C:2018:158*, 2 Maastricht Journal of European and Comparative Law 316 (2019); C. Contartese, M. Andenas, *Court of Justice: EU Autonomy and Investor-State Dispute Settlement under Inter Se Agreements between EU Member States*, 56 Common Market Law Review 157 (2019); A. Gourgourinis, *After Achmea: Maintaining the EU Law Compatibility of Intra-EU BITs Through Treaty Interpretation*, 3 European Investment Law and Arbitration Review 282 (2018); A. Bilanova, J. Kudrna, *Achmea: The End of Investment Arbitration as We Know It*, 3 European Investment Law and Arbitration Review 261 (2018); N. De Sadeleer, *The End of the Game: The Autonomy of the EU Legal Order Opposes Arbitral Tribunals under Bilateral Investment Treaties Concluded Between Two Member States*, 9 European Journal of Risk Regulation 355 (2018); C. Fouchard, M. Krestin, *The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky!*, Kluwer Arbitration Blog 2018, available at: https://bit.ly/3gvEvCG; V. Kapoor, *Slovak Republic v. Achmea: When Politics Came Out to Play*, Kluwer Arbitration Blog 2018, available at: https://bit.ly/2YY6y88; F. Stefan, *Brace for Impact? Examining the Reach of Achmea v. Slovakia* (Kluwer Arbitration Blog 2018), available at: https://bit.ly/3e1mDOv; V. Ponomarov, *CJEU Does Not Buy Wathelet's Opinion in Achmea – What Is Left Unanswered*, Kluwer Arbitration Blog 2018, available at: https://bit.ly/2VMJS8R; P. Nikitin, *The CJEU's Achmea Judgment: Getting Through the Five Stages of Grief*, Kluwer Arbitration Blog 2018, available at: https://bit.ly/3f0IQ0H; N. Lavranos, *After Achmea: The Need for an EU Investment Protection Regulation*, Kluwer Arbitration Blog 2018, available at: https://bit.ly/3iwdPnc; N. Newing, L. Alexander and L. Meredith, *What Next for Intra-EU Investment Arbitra-*

Achmea struck a lethal blow against intra-EU BIT investor-state arbitration in general, depriving arbitral tribunals of their jurisdiction to entertain any claims under intra-EU BITs. Yet others remain largely unimpressed by the CJEU's ruling. In fact, several arbitral tribunals have so far rejected the *Achmea*-based objection to their jurisdiction on various grounds. Recently, an arbitral tribunal dismissed *Achmea* as irrelevant to its jurisdiction to entertain claims under the applicable intra-EU BIT, arguing that any legal consequences stemming from the CJEU's judgment are limited to within the EU legal order. In the opinion of that tribunal, *Achmea*'s *rationale* did not impinge on the – distinct from the EU – international legal order, from which it derived its jurisdictional competence to rule on the case.[31]

In our view, the truth lies somewhere in the middle. In this section, we analyse *Achmea*'s consequences on intra-EU BIT investor-state arbitration from a treaty law perspective, explaining how *Achmea* deprives arbitral tribunals established under intra-EU BIT ISA clauses of their jurisdiction to entertain relevant disputes. At the same time, we approach the application of EU law as the limit to *Achmea*'s relevance to investor-state arbitration under intra-EU BITs. In doing so, we explain why the *Achmea rationale* only binds an arbitral tribunal in cases where it is entitled to interpret and apply EU law in determining its jurisdiction to hear a case under an intra-EU BIT.

Before proceeding to the examination of *Achmea*'s legal consequences on intra-EU BIT investor-state arbitration, it is necessary first to frame our analysis by making two preliminary points.

The first relates to the nature of EU law from the perspective of public international law. Despite its autonomous nature and particular characteristics, EU law stems from an international agreement between the Member States, namely the EU Treaties,[32] thus forming part of international treaty law.[33] Regardless of whether they form part of the EU Treaties or constitute secondary legislation, all EU legal rules are part of a regional system of international law, and therefore, have an international legal character.[34] Against this background, alleged conflicts between the provisions of intra-EU BITs and those of EU law are to be addressed as treaty conflicts, which are governed by international law.[35]

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tion? Thoughts on the Achmea Decision, Kluwer Arbitration Blog 2018, available at: https://bit.ly/3e8gnot; D. Dragiev, *A Procedural Perspective of Achmea: What Does Achmea Imply in Practice?*, Kluwer Arbitration Blog 2018, available at: https://bit.ly/2C6cLG8; D. Dragiev, *2018 in Review: The Achmea Decision and its Reverberations in the World of Arbitration*, Kluwer Arbitration Blog 2018, available at https://bit.ly/3gxvXLT (all accessed 30 June 2020).

[31] *United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award of the Tribunal of 21 June 2019, para. 503.

[32] *Achmea* (CJEU), paras. 33, 41.

[33] *See, ex multis*, O. Spiermann, *The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order,* 10 European Journal of International Law 763 (1999); B. De Witte, *The European Union as an International Legal Experiment,* in: G. de Búrca, J. H.H. Weiler (eds.), *The Worlds of European Constitutionalism,* Cambridge University Press, Cambridge: 2012, p. 19.

[34] *Electrabel S.A. v. Republic of Hungary,* ICSID Case No. ARB/07/19, Decision on Jurisdiction of 30 November 2012, para. 4.133.

[35] *Ibidem*, para. 4.120.

In fact, there is consensus among arbitral tribunals that international law encapsulates EU law, as constituting rules of international law applicable between the Member States.[36]

The second observation relates to the role of the CJEU and the effects of its rulings under international law. Through the EU Treaties, which, as pointed out above, are part of international law, the EU Member States have agreed on the establishment of a specialised *forum*, authorised to rule on questions of EU law.[37] Under Arts. 19(1) TEU and 344 TFEU, the CJEU is vested with the exclusive power authoritatively to interpret and apply the EU Treaties and the rights and obligations stemming from them. Given that in the context of intra-EU disputes both signatories of the applicable international agreement are EU Member States, they remain bound to respect the CJEU's rulings on matters pertaining to EU law.[38] To the extent that arbitral tribunals are bound by the application of EU law, as part of international law, for the adjudication of intra-EU investment disputes, they are also bound to give effect to the exclusive competence of the CJEU authoritatively to apply and interpret EU law provisions. Therefore, insofar as an intra-EU BIT dispute involves questions of EU law that have already been dealt with by the CJEU, the arbitral tribunal must adhere to the CJEU's interpretation and resolve the dispute before it accordingly. On that basis, the CJEU's interpretation of EU law in *Achmea* is binding not only on the courts and tribunals of the EU Member States, as part of the EU legal *acquis*;[39] but also on tribunals established under intra-EU BIT ISA clauses, as the ruling of a *forum* established to provide the authoritative interpretation of an international agreement between the contracting parties.[40] In a similar vein, as the CJEU's ruling only interprets existing and does not create new law, the Court's reasoning will be applicable *ex tunc*,[41] from the date on which the BIT became intra-EU, namely from the date on which the last of the parties to the BIT acceded to the EU.

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[36] *Ibidem,* paras. 4.122, 4.189, and 4.195; confirmed, *ex multis*, in ICSID Case No. ARB/14/3, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, Award of 27 December 2016, para. 278.

[37] J. McMahon, *The Court of the European Communities: Judicial Interpretation and International Organisation*, 37 British Yearbook of International Law 320 (1961).

[38] This has recently been affirmed by the arbitral tribunal in ICSID Case No. ARB15/16 *BayWa R.E. Renewable Energy GmbH and BayWa R.E. Asset Holding GmbH v. the Kingdom of Spain*, Decision on Jurisdiction, Liability and Directions on Quantum of 2 December 2019, para. 280.

[39] Joined Cases 28 to 30/62 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v. Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:6; Case C-453/00 *Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren* [2004] ECLI:EU:C:2004:17; Craig and De Búrca, *supra* note 21, pp. 475-476.

[40] *Vattenfall v. Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* issue, paras. 148 and 150. For more on the role of the CJEU as the authoritative source of interpretation of EU law, *see* the UNCLOS tribunal in *Mox Plant*, ITLOS Order No. 3, 24 June 2003, paras. 27 and 28, and Award in the *Arbitration regarding the Iron Rhine (Ijzeren Rijn) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision of 24 May 2005, Chapter III, in particular at para. 103.

[41] Case C-262/12 *Vent de Colère* [2013] ECLI:EU:C:2013:851, para. 39; Joined Case C-66, 127 and 128/79 *Salumi* [1980] ECLI:EU:C:1980:101, para. 9; Case C-61/79 *Amministrazione delle Finance dello Stato v. Denkavit Italiana* [1980] ECLI:EU:C:1980:100, para. 16; Case C-73/08 *Nicolas Bressol and Others and Céline Chaverot and Others v. Gouvernement de la Communauté Française* [2010] ECLI:EU:C:2010:181, para. 90.

2.1. A treaty law perspective of *Achmea*'s impact

In *Achmea*, the CJEU ruled that an ISA clause included in an international agreement between Member States, such as the one applicable in the Netherlands-Slovak Republic BIT, was incompatible with Arts. 267 and 344 TFEU. It is true that the CJEU reached this conclusion without applying the customary rules of international law on the conflict of norms, as codified in the Vienna Convention on the Law of Treaties (VCLT), to approach the alleged conflict between EU law and the pertinent intra-EU BIT.[42] However, the fact remains that insofar as a clause in an international agreement between Member States has been found incompatible with EU law, that clause is inapplicable. This outcome is supported both by virtue of the principle of supremacy of EU law, seen as a special rule of international law regulating conflicts between EU law and other *inter se* treaties of the EU Member States; and by reference to the *lex posterior* conflict rules of the VCLT.

First, the inapplicability of intra-EU BIT ISA clauses following the CJEU's judgment in *Achmea* can be supported under the principle of the supremacy of EU law. According to the latter, as originally developed by the case law of the CJEU[43] and enshrined in Declaration 17 annexed to the Final Act of the Intergovernmental Conference that adopted the Treaty of Lisbon, the provisions of EU law cannot be overridden by those of the Member States' national law.[44] More importantly for our present purposes, the CJEU has extended the application of the EU principle of supremacy also to include resolving conflicts between EU law and other international treaties between the EU Member States.[45] According to the Court,

> [...] since the bilateral instruments at issue now concern two Member States, their provisions cannot apply in the relations between those States if they are found to be contrary to the rules of the [EU] Treaty.[46]

The application of the principle of supremacy in cases of a conflict between the provisions of EU law and those of an *inter se* treaty renders the latter inapplicable,

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[42] *See also* A. Gourgourinis, *After Achmea: Maintaining the EU Law Compatibility of Intra-EU BITs Through Treaty Interpretation*, 3 European Investment Law and Arbitration Review 282 (2018), p. 293.

[43] *See, inter alia,* Case C-6/64 *Flaminio Costa v. E.N.E.L.* [1964] ECR I-01141; Case C-11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr –und Vorratsstelle für Getreide und Futtermittel* [1970] ECR I-01125.

[44] Case C-26/62 *NV Allgemene Transport – en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] ECR I-001; Craig and De Búrca, *supra* note 21, p. 266-267.

[45] Case C-478/07 *Budejovicky Budvar* [2009] ECLI:EU:C:2009:521, para. 98; Case C-469/00 *Ravil* [2003] ECR I-05053, para. 37; Case C-235/87 *Annunziata Matteucci v. Communauté française of Belgium et al.* [1988] ECR I-05589, para. 22; Case C-3/91 *Exportur S.A. v. Lor S.A. and Confiserie du Tech S.A.* [1992] ECR I-5529, para. 8; Case C-10/61 *Commission v. Italy* [1962] ECR I-00003; C. Söderlund, *Intra-EU BIT Investment Protection and the EC Treaty*, 24 Journal of International Arbitration 455 (2017), p. 463.

[46] *Budejovicky Budvar*, para. 98.

regardless of whether the conclusion of the respective *inter se* treaty preceded or followed the signatory's accession to the EU.[47] From this perspective, and in contrast to treaties between Member States and third countries, whose conflict with EU law is regulated by Art. 351 TFEU,[48] the provisions of international agreements between Member States do not apply once found incompatible with EU law.

Given the international nature of the EU Treaties, the general principle of supremacy of EU law constitutes, from a treaty law perspective, a special conflict rule of international law. By virtue of the latter, as identified by the CJEU and subsequently codified in the Lisbon Treaty, the Member States, as masters of their treaties, have agreed that EU law enjoys precedence over conflicting national legislation as well as over treaties concluded between them, whether preceding accession or subsequently enacted. As a special conflict rule, the principle of supremacy takes precedence over the residual rules of conflict of norms in the VCLT, which consequently do not apply in dealing with such conflicts. The application of the principle of supremacy to deal with conflicts between the EU Treaties and *inter se* agreements is supported by settled case law of the CJEU.[49] This argument has also been raised by several Member States as well as by the Commission itself, as *amicus curiae*,[50] in the context of intra-EU BIT arbitral proceedings.[51] In fact, in *Achmea* both Slovakia and the Commission, relying on the case law of the CJEU, argued that potential breaches of EU law cannot

[47] Report of the Study Group of the International Law Commission, finalised by M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (ILC 2006), p. 143; J. Klabbers, *The Validity of EU Norms Conflicting with International Obligations*, in: E. Cannizzaro, P. Palchetti, R. A Wessel (eds.), *International Law as Law of the European Union*, Brill, Leiden: 2011, p. 122; R. Schütze, *EC Law and International Agreements of the Member States – An Ambivalent Relationship,* 9 The Cambridge Yearbook of International Legal Studies 387 (2007), p. 395; P. Manzini, *The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law*, 12 European Journal of International Law 781 (2001), p. 784.

[48] N. Lavranos, *Protecting European Law from International Law*, 15 European Foreign Affairs Review 265 (2010), p. 267; P. Manzini, *The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law*, 12 European Journal of International Law 781 (2001). *See also* K. Von Papp, *Solving Conflicts with International Investment Treaty Law from an EU Perspective: Article 351 TFEU Revisited*, 42 Legal Issues of Economic Integration 325 (2015), p. 328; R. Schütze, *An Introduction to European Law* (2nd ed.), Cambridge University Press, Cambridge: 2015, pp. 147-149.

[49] *See supra* note 45.

[50] Tribunals characterise as *amicus curiae* a non-party to the dispute, a "friend" offering to "help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives and expertise that the litigating parties may not provide", *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. the Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition by 5 Non-Governmental Organisations for Permission to Make an *Amicus Curiae* Submission of 19 May 2005, para. 20; L. Bastin, *The Amicus Curiae in Investor-State Arbitration*, 1 Cambridge Journal of International and Comparative Law 208 (2012), p. 217; J. Viñualez, *Amicus Intervention in Investor-State Arbitration*, 61 Dispute Resolution Journal 72 (2006), p. 76.

[51] *Achmea B.V. v. the Slovak Republic (former Eureko B.V.)*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, para. 180; A. Reinisch, *Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the Eastern Sugar and Eureko Investment Arbitrations*, 39 Legal Issues of Economic Integration 157 (2012), p. 161.

be justified by recourse to an international agreement between two EU Member States.[52]

The direct consequence of reading *Achmea* in the light of the principle of supremacy as a special conflict rule of international law is the inapplicability of intra-EU BIT ISA clauses such as the one at issue in *Achmea*, due to their incompatibility with Arts. 267 and 344 TFEU. This is also the view of the EU Member States expressed in their 15 and 16 January 2019 Declarations "on the Legal Consequences/Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union."[53] In their Declarations, all Member States accepted that as a result of *Achmea*, intra-EU BIT ISA clauses are incompatible with EU law, and thus inapplicable, on the ground that EU law takes precedence over intra-EU BITs. These ISA clauses are inapplicable from the moment when their incompatibility with EU law first arose. Even though in exceptional cases the CJEU may impose temporal limitations on the application of its judgments,[54] it did not do so in *Achmea*, despite a specific request to that effect during the oral hearing. In the absence of a qualification as to *Achmea*'s effects *rationae temporis*, the inapplicability of such intra-EU BIT ISA clauses dates back to the moment when the BIT at issue became intra-EU.

Even if one did not accept the application of the principle of supremacy as a special conflict rule of international law, the inapplicability of ISA clauses following *Achmea* could also be supported through the application of the *lex posterior* conflict rule set out in Art. 30(3) VCLT, regulating the "application of successive treaties relating to the same subject-matter." Art. 30(3) VCLT provides that

> When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59 [VCLT], the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

The application of Art. 30(3) VCLT seems to presuppose that the treaties under examination relate to the same subject matter. On that ground it has been suggested that Art. 30(3) VCLT cannot apply to resolve conflicts between the EU Treaties and intra-EU BITs, as these treaties do not relate to the same subject matter.[55] However, it is widely accepted in the academic scholarship that the "same subject matter" criterion cannot be decisive for determining the applicability of Art. 30 VCLT.[56] It is the wording

[52] *Ravil*, para. 37; *Exportur*, 45, para. 8; *Achmea v. Slovakia* (Award on Jurisdiction), para. 180.

[53] Declaration of the Representatives of the Governments of the Member States of 15 and 16 January 2019 on the Legal Consequences/Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, available at: https://bit.ly/2ZCIruN, https://bit.ly/3f2a5YF and https://bit.ly/2VKy6eX (all accessed 30 June 2020).

[54] *Vent de Colère*, paras. 40-43.

[55] *United Utilities (Tallinn) v. Estonia*, para. 543; *Jan Oostergetel and Theodora Lauretius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction of 30 April 2010, para. 104; *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award of 27 March 2007, para. 159.

[56] *See* K. von der Decken, *Article 30*, in: O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Springer: 2018, pp. 544-545 and further references therein.

of Art. 30 VCLT that introduces the notion of compatibility.[57] In addition, the fact that the "same subject-matter" criterion coincides with the concept of "conflict" in the context of Art. 30 VCLT is supported by the VCLT's *travaux préparatoires*. The ILC Draft of 1964 of what was then Art. 63 used the following wording: "[…] the obligations of States parties to treaties, the provisions of which are incompatible, shall be determined in accordance with the following paragraphs."

At that point in time, the sole criterion for the application of Art. 30 VCLT was "incompatibility", namely conflict between the provisions of two treaties. Only in the ILC Final Draft was the phrase "the provisions of which are incompatible" replaced by "relating to the same subject-matter." The accompanying commentary explains the reason for that change:

> On re-examining the article at the present session the Commission felt that, although the rules may have particular importance in cases of incompatibility, they should be stated more generally in terms of the application of successive treaties to the same subject matter. […] Consequently, while the substance of the article remains the same as in the 1964 text, its wording has been revised in the manner indicated.[58]

A provision of an international treaty may be incompatible with one of an earlier treaty even if they do not regulate the same subject matter. *Vice versa*, the fact that two successive treaties regulate the same subject matter does not in and of itself preclude their harmonious coexistence, unless a conflict in their provisions can be identified that excludes their simultaneous application.[59] On that basis, it appears that only the identification of such a conflict is necessary when dealing with the relationship between successive international treaties under Art. 30 VCLT.

Viewed against this background, the EU Treaties constitute a later treaty in the sense of Art. 30(3) VCLT, as the Member States have recently reaffirmed the EU Treaties through the Treaty of Lisbon, which entered into force in 2009. This is also the case for Croatia, which acceded to the Union in 2013. Therefore, any conflict between the provisions of the EU Treaties and those of an intra-EU BIT will be resolved in favour of the former, regardless of whether EU law and intra-EU BITs can be said to regulate the same subject matter. Since intra-EU BIT ISA clauses have been found to be in conflict with the provisions of the EU Treaties by the *forum* entrusted with the authoritative interpretation thereof, namely the CJEU, such clauses will be inapplicable from the moment when that conflict arose.

In practical terms, the inapplicability of an intra-EU BIT ISA clause strikes a blow against the competence of an arbitral tribunal to entertain claims under the respective

[57] Art. 30(3) VCLT provides that "[...] the earlier treaty applies only to the extent that its provisions are *compatible with* those of the later treaty" (emphasis added).

[58] R. Günther Wetzel, D. Rauschning, *The Vienna Convention on the Law of the Treaties Travaux Préparatoires*, Alfred Metzner 1978, pp. 227-236.

[59] Koskenniemi, *supra* note 47, p. 18; E.W. Vierdag, *The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions*, 59 The British Yearbook of International Law 75 (1989), p. 100.

BIT from the moment when the BIT became intra-EU.[60] Intra-EU BIT arbitral tribunals constitute international tribunals, whose jurisdiction is always consent-based.[61] In the context of ISAs, the tribunal's jurisdiction derives from the applicable treaty, bilateral or multilateral, whereby the contracting states agreed *ex ante* on the jurisdiction of the arbitral tribunal to hear disputes brought against either of them by investors-nationals of the other state(s).[62] ISA clauses reflect a unilateral offer of consent to arbitration by the treaty's contracting parties. Hence, the tribunal's jurisdiction is only established once an eligible investor brings a claim against a signatory state to arbitration, thus accepting the offer to arbitrate disputes included in the treaty.[63] At that point, the investor perfects an arbitration agreement with the Member State and the latter's consent to the tribunal's jurisdiction becomes irrevocable.[64] Yet insofar as an ISA clause in an international agreement between Member States is incompatible with Arts. 267 and 344 TFEU, such a clause is inapplicable under either the principle of supremacy of EU law or the l*ex posterior* conflict rule of Art. 30(3) VCLT. This means that the Member States cannot have validly consented to arbitration via the respective ISA clause, and that therefore no valid arbitration agreement could have been concluded on that basis. Consequently, an arbitral tribunal established under an ISA clause of an *inter se* international agreement lacks jurisdiction to entertain claims brought thereunder.

The above reasoning has been upheld by national courts in the context of annulment proceedings of arbitral awards rendered by intra-EU BIT arbitral tribunals. Following

[60] De Sadeleer, *supra* note 30, p. 366; M. Gregoire, *Intra-EU BIT Arbitrations Declared Incompatible with EU Law Judgment Rendered in C-284/16 – Slowakische Republik v. Achmea BV* (4 New Square 2018), available at: https://bit.ly/3iAeDHJ (accessed 30 June 2020), para. 30.

[61] N. Rubins, T. Papanastasiou, S. Kinsella, *International Investment, Political Risk and Dispute Resolution: A Practitioner's Guide* (2nd ed.), Oxford University Press, Oxford: 2020, paras. 7.01-7.36; M. Waibel, *Investment Arbitration: Jurisdiction and Admissibility*, in: M. Bungenberg et al. (eds.), *International Investment Law: A Handbook,* Hart: 2015, p. 1222; A. M. Steingruber, *Consent in Investment Arbitration,* Oxford University Press, Oxford: 2015, p. 225; K. Valdevelde, *Bilateral Investment Treaties*, Oxford University Press, Oxford: 2010, p. 433; H.E. Kjos, *Applicable Law in Investor-State Arbitration*, Oxford University Press, Oxford: 2013, p. 20.

[62] C. Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, 1 McGill Journal of Dispute Resolution 1 (2015), p. 2.

[63] C. Schreuer, *Consent to Arbitration*, in: P. T. Muchlinski, F. Ortino, C. Schreuer (eds.), *The Oxford Handbook of International Investment Law,* Oxford University Press, Oxford: 2015, p. 830, 836; R. Dolzer, C. Schreuer, *Principles of International Investment Law* (2nd ed.), Oxford University Press, Oxford: 2012, p. 257; Rubins et al., *supra* note 61, paras. 7.01-7.36, 7.112; Kjos, *supra* note 61, p. 72.

[64] Douglas makes a distinction between the "derivative" model, in the context of which it is supported that investment arbitration is nothing but the mere "institutionalisation" of the diplomatic protection model. According to this view, the investor is enforcing the rights of its national state, simply stepping into the procedural shoes of the latter; and the "direct" model, under which the investor is considered to be conferred an individual right that it will seek to vindicate by means of international treaty arbitration. Based on the "direct" model, once the investor brings a claim before the arbitral tribunal, the contracting parties to the BIT may no longer withdraw their consent to arbitrate such dispute, as to do so would violate the investor's right to proceed to arbitration, *see* Z. Douglas, *The International Law of Investment Claims,* Cambridge University Press, Cambridge: 2009, pp. 10-11; *see also* J. Paulsson, *Arbitration without Privity,* 10 ICSID Review 232 (1995).

Achmea, the *Bundesgerichtshof,* which originally referred the questions to the CJEU, accepted Slovakia's appeal and set aside the arbitral tribunal's award on the ground that there had been no valid arbitration agreement between the parties to the dispute, as required under the applicable German Arbitration Law. This was similarly accepted by the Swedish Court of Appeal (Svea Court) in its recent ruling in the context of *PL Holdings S.a.r.l v. Poland*.[65] In that case, the Svea Court found the applicable intra-EU BIT ISA clause to be identical to the one at issue in *Achmea.*[66] According to the Svea Court, *Achmea* had clarified that no valid arbitration agreement could have been concluded based on an intra-EU BIT ISA clause, like the one at issue in that case.[67] However, it ended up rejecting the *Achmea*-based jurisdictional objection on the ground that it was raised too late in the arbitral process. To the Svea Court, Poland's failure timely to object to the tribunal's jurisdiction in the course of the arbitral proceedings had resulted in it having entered directly into a new, tacit arbitration agreement with the investor. The tribunal's jurisdiction was, therefore, not based on the incompatible-with-EU-law ISA clause of the Poland-Belgium/Luxembourg BIT, but on the common will of the parties to the dispute, as expressed in their tacit arbitration agreement.[68] Recently, the Swedish Supreme Court, before which the matter is currently pending, requested a preliminary ruling from the CJEU on the Svea Court's reading of *Achmea*. It now remains to be seen how the Court, having the authoritative and final say on the matter, will choose to approach this question.[69]

2.2 EU law as a qualification to the application of *Achmea*

As was examined above, the inapplicability of intra-EU BIT ISA clauses following *Achmea* deprives arbitral tribunals of their jurisdiction to entertain intra-EU BIT disputes; since the Member States' consent to arbitration was granted through an intra-EU BIT ISA clause, the inapplicability of that clause invalidates the arbitration agreement itself.

However, these considerations may not apply in all cases. One should bear in mind that in order for an arbitral tribunal to be able to consider *Achmea* in a dispute pending before it, thus being bound to reject its jurisdiction to entertain an intra-EU BIT dispute, it must be empowered to take EU law into account in the resolution of that dispute. This is so for two reasons.

First, Arts. 267 and 344 TFEU as well as the factual and legal background of *Achmea* presuppose that in order for *Achmea* to be applicable the arbitral tribunal in question

[65] SCC Case No. V 2014/163.

[66] *PL Holdings S.a.r.l. v. Poland*, SCC Case No. V 2014/163, Judgment of Svea Court of Appeal on Set-aside Application of 22 February 2019, p. 41.

[67] *Ibidem*, p. 42.

[68] *Ibidem*, pp. 43-44; *see also* K. Georgaki, *The Decision of the Svea Court of Appeal in PL Holdings v. Poland: A Mutiny against Achmea?* (Cambridge International Law Journal 2019), available at http://cilj.co.uk/2019/08/07/the-decision-of-the-svea-court-of-appeal-in-pl-holdings-v-poland-a-mutiny-against-achmea/ (accessed 30 June 2020).

[69] *See* https://www.italaw.com/sites/default/files/case-documents/italaw11099.pdf (in Swedish).

must be entitled to interpret and apply EU law to the dispute before it.[70] In order for a conflict with Arts. 267 and 344 TFEU to be established, these Articles presuppose that the case at issue relate to the interpretation and application of EU law.[71] It was on that basis that the CJEU in *Achmea* ruled against the intra-EU BIT ISA clause's compatibility with EU law to begin with. Art. 8(6) of the applicable Netherlands-Slovak Republic BIT clearly empowered the arbitral tribunal to decide the dispute applying Slovakia's domestic law as well as any other relevant agreements between the latter and the Netherlands. On that ground the CJEU held that EU law would become applicable to the resolution of any dispute arising under the respective intra-EU BIT, either as part of Slovakia's domestic law or as international law. It was precisely the fact that an arbitral tribunal falling outside the scope of Art. 267 TFEU would be empowered to interpret and apply EU law which led the CJEU to conclude that the ISA clause was incompatible with Arts. 267 and 344 TFEU.

Secondly, in adjudicating intra-EU BIT disputes and prior to proceeding on the merits, an arbitral tribunal needs to establish its jurisdiction to hear the case pending before it.[72] As already analysed, *Achmea* deprives arbitral tribunals of their jurisdiction to entertain intra-EU disputes. Since the Member States' consent to arbitration has been granted through the ISA clause of an intra-EU BIT, the inapplicability of such a clause invalidates any arbitration agreement based thereon.[73] However, in order for an arbitral tribunal to be bound by the CJEU's definitive interpretation of EU law in *Achmea,* the intra-EU BIT ISA clause must allow it to apply and interpret EU law – and therefore *Achmea* – to decide on its jurisdiction.

In this regard, it should be pointed out that in order for a tribunal to consider EU law in ruling on its competence, the latter must be part of the law the tribunal examines to decide on its jurisdiction. However, this will normally be the case, as EU law will be relevant directly, as part of international law (itself deriving from international treaties, namely from the EU treaties), and in cases where the BIT at issue explicitly provides for the application of EU law as such, through an express *renvoi*; or, in any case, indirectly, through the interpretation of the law applicable to determine the tribunal's jurisdiction

[70] *See also PL Holdings S.a.r.l. v. Poland* (Svea Court of Appeal), p. 44.

[71] M. Klamert, *Article 344 TFEU*, in: M Kellerbauer, M. Klamert, J. Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford University Press, Oxford: 2019, p. 2045; B. Schima, *Article 267 TFEU*, in: M Kellerbauer, M. Klamert, J. Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford University Press, Oxford: 2019, pp. 1824-1827; S. Gáspár-Szilágyi, *It Is not Just about Investor-State Arbitration: A Look at Case C-284/16, Achmea BV*, 3 European Papers 357 (2018), p. 363.

[72] Given that the authority of arbitral tribunals to decide their own jurisdiction is expressed in the *Kompetenz Kompetenz* doctrine, the latter is a necessary precondition for the proper exercise of the arbitral function; *see* Waibel, *supra* note 61, pp. 1231-1232; *see also* Art. 41 of the ICSID Convention.

[73] *European American Investment Bank AG (EURAM) v. the Slovak Republic*, PCA Case No 2010-17, Award on Jurisdiction of 22 October 2012, para. 50; Y. Shany, *Jurisdiction and Admissibility*, in: C.P.R. Romano, K. Alter, Y. Shany (eds.), *The Oxford Handbook of International Adjudication,* Oxford University Press, Oxford: 2015, p. 779.

under Art. 31(3)(c) VCLT, as part of the relevant rules of international law applicable in the relations between the treaty's contracting parties.[74]

Cases whereby an international treaty provides that a tribunal can directly consider EU law as such and not as part of international law are the least troublesome in that respect, yet also the most rare. A relevant example can be found in Art. 11(2) of the Austria-Croatia BIT, according to which "the Contracting Parties are not bound by the present agreement insofar as it is incompatible with the legal *acquis* of the European Union (EU) in force at any given time."[75] This treaty has already been relied upon in several cases currently pending before ICSID tribunals against the Republic of Croatia on account of the Government's conversion of consumer loans denominated or indexed to the Swiss Franc which, pursuant to the Croatian Supreme Court – on the basis of settled case law of the CJEU – were contrary to EU law on consumer protection.[76] Based on the wording of Art. 11(2), a tribunal constituted under the respective intra-EU BIT will be bound to reject its jurisdiction to rule on cases brought thereunder after *Achmea,* since the scope of the Member States' consent, as expressed in the BIT, is limited to what is "compatible" with the EU *acquis*. The EU *acquis* includes the case law of the CJEU.

Even in the absence of an express *renvoi*, intra-EU BIT arbitral tribunals can still directly consider EU law – and therefore, *Achmea* – in determining their competence, as part of international law; or indirectly, as international rules relevant in the interpretation of the applicable BIT under Art. 31(3)(c) VCLT. In investor-State arbitration, the tribunal's jurisdiction is founded on the applicable BIT and arbitration rules, as well as on the parties' consent to arbitration. Given the nature of the above as instruments of international law, the latter will always be relevant to a tribunal in ruling on its jurisdiction.[77] Consequently, so will EU law rules, as part of international law.

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[74] An alternative option would be for EU law to be applied indirectly, as an inherent part of a Member State's national legal order, whenever the seat of arbitration is in a Member State. In applying EU law through the lens of a Member State's domestic law, the tribunal will be bound by the rule set out in Art. 27 VCLT. Hence, even though the tribunal will be empowered to take EU law into account, in such a scenario conflicts between EU law and the provisions of the intra-EU BIT will be resolved in favour of the BIT, the latter constituting international rather than the internal obligations of the Member State at issue, A.A. Ghouri, *Resolving Incompatibilities of Bilateral Investment Treaties of the EU Member States with the EC Treaty: Individual and Collective Options*, 16 European Law Journal 806 (2010), p. 812.

[75] Agreement between the Republic of Austria and the Republic of Croatia for the Promotion and Protection of Investments, signed on 19 February 1997 and entered into force on 1 November 1999, available at https://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/236 (accessed 30 June 2020).

[76] *UniCredit Bank and Zagrebačka Banka v. Republic of Croatia*, ICSID Case No. ARB/16/31 (pending); *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/34 (pending); *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37 (pending).

[77] *See also* in this regard *Georges Pinson (France) v. United Mexican States*, Award of 19 October 1928 UNRIAA V, p. 422, where it was held that "toute convention internationale doit être réputée s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne résout pas elle-même en termes exprès et d'une façon différente."

Since the *Achmea* judgment, arbitral practice has used the application of EU law as a limit to considering the consequences that the CJEU's judgment entails on their competence to rule on intra-EU disputes. However, the arguments employed to dismiss the pertinence of EU law, and therefore *Achmea*, on the cases before them have not always been convincing. In the attempt to establish a carve out from *Achmea*, arbitral tribunals have been rejecting the relevance of EU law in determining their jurisdiction at any cost. This was the case for example in *United Utilities v. Estonia,* a case brought under the Netherlands – Estonia BIT, where an ICSID tribunal found EU law not to be relevant in deciding its jurisdiction and dismissed the *Achmea*-based objection. Its reasoning was, *inter alia*, that

> [w]hile EU law forms part of both Dutch and Estonian law and is relevant to public international law, the jurisdiction of the Tribunal arises from and is founded on the BIT and the ICSID Convention, as well as on the Parties' consent as required by these instruments. As a result, the question of jurisdiction is properly to be approached by analysing those agreements and the relevant facts from a public international law perspective.[78]

However, this reasoning has flaws. Even if the tribunal could not have applied EU law directly to rule on its jurisdiction, it should still have considered it indirectly as "relevant rules of international law applicable in the relations between the parties" under Art. 31(3)(c) VCLT in its interpretation of the parties' instruments of consent. Since the tribunal would be in a position to interpret EU law in that context to identify the meaning of the applicable ISA clause, the *Achmea* rationale would apply to the case at hand. Instead, the *United Utilities* tribunal dismissed the *Achmea*-based objection, disregarding the nature of the EU treaties as instruments of international law applicable between the parties to the BIT at issue within the meaning of Art. 31(3)(c) VCLT.[79]

CONCLUSIONS

In *Achmea*, the CJEU ruled that ISA clauses, like the one included in the Dutch-Slovak Republic BIT, are incompatible with Arts. 267 and 344 TFEU. As a direct consequence of this incompatibility, such ISA clauses are inapplicable. The inapplicability of intra-EU BIT ISA clauses following *Achmea* deprives arbitral tribunals of their jurisdic-

[78] *Ibidem*, para. 532.

[79] Although this paper does not deal with *Achmea*'s applicability to the ECT, it is relevant to mention that arbitral tribunals established under Art. 26 ECT have also used the non-pertinence of EU law as one of the grounds for rejecting *Achmea*'s relevance to their jurisdiction to entertain ECT disputes, *see e.g. Vattenfall v. Germany*; K. Georgaki, *The Decision on the Achmea Issue in Vattenfall v. Germany or: How to Escape the Application of the CJEU's Decision in Achmea in Three Steps*, Oxford Business Law Blog 2018, available at: https://www.law.ox.ac.uk/business-law-blog/blog/2018/11/decision-achmea-issue-vattenfall-v-germany-or-how-escape-application; K. Schwedt, H. Ingwersen, *Intra-EU ECT Claims Post-Achmea: Vattenfall Decision Paves the Way*, Kluwer Arbitration Blog 2018, available at: http://arbitrationblog.kluwerarbitration.com/2018/12/13/intra-eu-ect-claims-post-achmea-vattenfall-decision-paves-the-way/ (both accessed 30 June 2020).

tion to entertain intra-EU BIT disputes; since the Member States' consent to arbitration was granted through the intra-EU BIT ISA clause, the inapplicability of that clause invalidates the arbitration agreement itself. In the absence of a specific qualification as to the consequences of *Achmea rationae temporis*, the inapplicability of intra-EU BIT ISA clauses dates back to the time when the BIT at issue became intra-EU.

Yet, in order for an arbitral tribunal to be able to consider *Achmea* in an intra-EU BIT dispute pending before it, thus being bound to reject its jurisdiction in the case, it must be empowered to take EU law into account in the determination of its jurisdiction. This will normally be the case, if the applicable intra-EU BIT expressly provides for the application of EU law as such (through an express *renvoi*); EU law may become applicable directly as part of international law; in any event, under Art. 31(3)(c) VCLT, as an intra-EU BIT arbitral tribunal is always empowered to interpret the law applicable to its jurisdiction in the light of EU law, given that EU law constitutes "relevant rules of international law" applicable in the relations between the BIT's contracting parties. However, so far arbitral tribunals in the post-*Achmea* era have used the application of EU law as a carve out of the *Achmea*-based objection to their jurisdiction in cases brought under intra-EU BITs.

The fact that arbitral tribunals have used the pertinence of EU law as a way around *Achmea*'s predicament does not mean that the decision's impact on intra-EU BIT investor-state arbitration is insignificant. So far, national courts faced with annulment proceedings of intra-EU BIT arbitral awards have upheld *Achmea*'s consequences vis-à-vis the competence of arbitral tribunals to entertain intra-EU BIT disputes. In addition, *Achmea* has set in motion the long-anticipated process of reshaping the landscape with regard to intra-EU investment protection. As a result of *Achmea,* the EU Member States have declared their intention to terminate all intra-EU BITs to which they are signatories, by means of a plurilateral treaty or bilaterally.[80] In doing so, they have decided to take political action to resolve a controversy between investors and respondent Member States as well as between the Member States and the Commission; a controversy that has lasted for over a decade. In the light of the ECOFIN Council conclusions of 11 July 2017 and the imminent termination of intra-EU BITs, the Member States have now declared their intention to intensify discussions with the Commission to ensure effective intra-EU investment protection, this time within the EU legal framework. These discussions will include both the assessment of existing processes and mechanisms of dispute resolution as well as of the need to create new ones or to improve the existing ones under EU law.[81] Against this background, any gap in intra-EU investment protection resulting from the termination of intra-EU BITs will henceforth be covered on the EU level in a comprehensive manner.

[80] Declaration of the Representatives of the Governments of the Member States, *supra* note 53, p. 4; *See also* K. Georgaki, *The EU's Competence over Cross-Border Investment in the Post-Lisbon Era*, 1 European Politeia 125 (2018), p. 153.

[81] Declaration of the Representatives of the Governments of the Member States, *supra* note 53, p. 3.