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# IMPLEMENTING *ACHMEA*: THE QUEST FOR FUNDAMENTAL CHANGE IN INTERNATIONAL INVESTMENT LAW

**Abstract:** *The judgment of the Court of Justice in the Achmea case evoked significant repercussions regarding the application and operation of the bilateral investment treaties (BITs) concluded between EU Member States. As a result of this decision, EU Member States have decided to terminate almost 190 intra-EU BITs. Nevertheless, full implementation of the Achmea judgment remains a complex issue, entangled in political and legal controversies concerning intra-EU BITs which have been present for more than a decade. On a more general level, the implementation process is simultaneously entwined in two other significant debates: the specifics of the rights of investors, and the relationship between EU law and international law.*

**Keywords:** Achmea, bilateral investment treaty, BIT, conflict of treaties, European Union, ISDS, VCLT

## INTRODUCTION

The judgment of the Court of Justice of the European Union (CJEU) in the *Achmea* case[1] evoked significant repercussions regarding the application and operation of the bilateral investment treaties concluded between European Union Member States (intra-EU BITs). As a result of this decision, EU Member States decided to terminate its almost 190 BITs, *i.e.* about 8% of the existing and binding worldwide BITs.[2] Simultaneously,

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[1] Case C-284/16 *Slowakische Republik v. Achmea BV* [2018] EU:C:2018:158.

[2] According to UNCTAD, 2336 BITs have entered into force (*see* https://investmentpolicy.unctad.org/international-investment-agreements, accessed 30 June 2020).

a decision by the Luxembourg court can have a significant influence on arbitral and post-arbitral proceedings carried out on the basis of these treaties.[3]

On a global level, the CJEU judgment contributed to the adherence of a process of resignation from arbitration in favour of domestic courts by the EU Member States *inter se*. This process, advocated in the beginning by the countries of the global south (Brazil, Venezuela, Ecuador, South Africa), is now slowly finding some support also in the practice of developed states.[4] Thus, the *Achmea* decision, seen through the concepts of EU law (the principle of mutual trust),[5] resembles arguments (albeit limited in their geographical scope) advocated earlier by the supporters of the Calvo doctrine and New International Economic Order favouring domestic jurisdiction.[6]

On a micro level, the process of implementation of the *Achmea* decision has much more of a heterogeneous character and should be evaluated taking into account the position of EU institutions, governments, domestic courts, and investment tribunals.

The purpose of this article is to present the process of implementation of the *Achmea* decision with respect to intra-EU BITs and investor-state dispute settlement (ISDS) proceedings under those agreements. Thus, it will not in principle relate to the EU and its Member States investment agreements with third states, nor to the intra-EU application of the Energy Charter Treaty (ECT). This article also leaves aside the issue of the influence of the *Achmea* judgment upon general EU constitutional law, such as the principle of mutual trust, the procedure for preliminary references, and the scope of exclusive jurisdiction of the CJEU.

The first part of this paper recaps the relationship between EU law and intra-EU BITs from the perspective of investment tribunals' decisions, as well as the governmental discussions and actions in this respect preceding the *Achmea* judgment. The second part briefly recalls the position taken by the CJEU and the debate following it. The main part of the article discusses the position of the European Commission (EC) and EU Member States, as presented in declarations from January 2019. Furthermore, it relates also to the practice of domestic courts and investment tribunals faced with the *Achmea* question. Finally, it evaluates the plurilateral treaty on the termination of intra-EU

[3] For more on the scale of this process, *see* UNCTAD, *Fact Sheet on Intra-European Union Investor –State Arbitration Cases*, December 2018, iss. 3.

[4] *See e.g.* the elimination of ISDS in Australia-New Zealand relations under Progressive and Comprehensive Trans-Pacific Partnership (PCTPP), or in Canada-US relations under USMCA, *see* L. Kulaga, *ISDS During a Period of Transformation. Favoring Domestic Courts and Selective Judicialization in USMCA*, 17(3) Transnational Dispute Management 1 (2020), pp. 12-13.

[5] "When we say to all the member states (all of them ) (...) that they have to live up to the common standard, then they must also be entitled to the same trust and not be forced into a bilateral public international law agreement with the western member state, saying whatever you do, you know, I don't trust you, you sing off disempowering your national courts or you don't get a money of our investments. That is Achmea." (President of the European Court of Justice Koen Lenaerts at II LAwTTIP Joint Conference: EU Law, Trade Agreements, and Dispute Resolution Mechanisms: Contemporary Challenges (March 2019), available at https://www.transnational-dispute-management.com/audiovisual-library.asp, accessed 30 June 2020).

[6] *See generally* A.V. Freeman, *Recent Aspect of Calvo Doctrine and the Challenge to International Law*, 40 American Journal of International Law 190 (1946).

BITs, signed on the 5 May 2020, from the perspective of treaty law, investment law, and to some extent EU law.

## 1. INTRA EU-BITS AND EU LAW – BEFORE *ACHMEA*

The interaction between intra-EU BITs and EU law has been the subject of consideration in several arbitration proceedings.[7] In them, the EU Member States (almost exclusively from Eastern Europe) acting as respondents held that intra-EU BITs were terminated in accordance with Art. 59 of the Vienna Convention on the Law of Treaties (VCLT).[8] Simultaneously the EC, intervening in some of these proceedings, empha-

[7] *Eastern Sugar BV (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007; *Rupert Joseph Binder v. Czech Republic*, Award on Jurisdiction, 6 June 2007; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, Decision on Jurisdiction, 30 April 2010; *Eureko B.V. v. Slovak Republic*, PCA Case No. 2008–13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010; *Achmea B.V. (formerly known as "Eureko B.V."). v. Slovak Republic*, PCA Case No. 2008–13, Final Award, 7 December 2012; *European American Investment Bank AG (EURAM) v. Slovak Republic*, Award on Jurisdiction, 22 October 2012; *Electrabel SA v. Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012; *I.P. Busta & J.P. Busta v. The Czech Republic*, Case V 2015/014, Final Award, 10 March 2017; *Anglia Auto Accessories Limited v. The Czech Republic*, Case V 2014/181, Final Award, 10 March 2017.

This issue was also profoundly analysed by the doctrine. *See generally* H. Wehland, *Intra-EU Investment Agreements and Arbitration: Is EC Law an Obstacle?*, 2 International and Comparative Law Quarterly 297 (2009); T. Eilmansberger, *Bilateral Investment Treaties and Eu Law*, 46 Common Market Law Review 383 (2009); M. Burgstaller, *The Future of Bilateral Investment Treaties of EU Member States*, in: M. Bungenberg, J. Griebel, S. Hindelang (eds.), *International Investment Law and EU Law*, Springer-Verlag, Berlin, Heidelberg: 2011, pp. 76-77; A. Reinisch, *The Decisions on Jurisdiction in the Eastern Sugar and Eureko Investment Arbitrations*, 2 Legal Issues of Economic Integration 157 (2012); A. Dimopoulos, *The Compatibility of Future EU Investment Agreements with EU Law*, 39 Legal Issues Of Economic Integration 447 (2012); E. Bohm, M.-C. Motaabbed, *The European Union and the Unloved BITs of Its Member States*, Austrian Yearbook on International Arbitration 371 (2014); U. Kriebaum, *The Fate of Intra-EU BITs from an Investment Law and Public International Law Perspective*, 1 ELTE Law Journal 27 (2015); J.P. Gaffney, Z. Akcay, *European Bilateral Approaches*, in: M. Bungenberg et al. (eds.), *International Investment Law: A Handbook*, Beck-Hart-Nomos, 2015, pp. 193-196; M. Bungenberg, S. Hobe, *The Relationship of International Investment Law and European Union Law* (ibidem), pp. 1622-1626; J. Kokott, C. Sobotta, *Investment Arbitration and EU Law*, 18 Cambridge Yearbook of European Legal Studies 1 (2016); C. Binder, *A Treaty Law Perspective on Intra-EU BITs*, 17 Journal of World Investment & Trade 964 (2016); J. Fecak, *International Investment Agreements and EU Law*, Wolters Kluwer, Alphen aan den Rijn: 2016; P. Koutrakos, *The Relevance of EU Law for Arbitral Tribunals: (Not) Managing the Lingering Tension*, 17 Journal World Investment & Trade 873 (2016); E. Bjorge, *EU Law Constraints on Intra-EU Investment Arbitration?*, 16 The Law and Practice of International Courts and Tribunals 71 (2017); N. Basener, *Investment Protection in the European Union*, Nomos Verlag, Baden Baden: 2017, pp. 235-240; B. Yin, L.P. Goldsmith, *Intra-EU BITs: Competence and Consequences*, in: N. Kaplan, M. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles*, Wolters Kluwer, Alphen aan den Rijn: 2018, pp. 217-242.

[8] *Binder*, para. 19; *Eastern Sugar*, paras. 100-103; *Euram*, para. 83; *Eureko*, para. 63; This position was also applied by the EC in *Ioan Micula, Viorel Micula and Others v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, 26 February 2016, para. 331. *See generally* J. Klabbers, *Treaty Conflict and the European Union*, Cambridge University Press, Cambridge: 2009, p. 22; Basener, *supra* note 7, p. 245.

sized the primacy of EU law over those treaties and as a consequence the inapplicability of certain of their provisions in accordance with Art. 30(3) VCLT.[9] The EC further underlined the inconsistency of intra-EU BITs with the principle of non-discrimination (Art. 18 of the Treaty on the Functioning of the European Union, TFEU) as well as the possible incursion of investment arbitral tribunals into the exclusive competences of the CJEU envisaged by Arts. 267 and 344 TFEU. These arguments were in general contested by the arbitral tribunals, which in particular took the position that Art. 344 TFEU is applicable only to inter-state proceedings.[10] They also stated that the conflict of norms provision of VCLT[11] cannot be applied, as it requires treaties to be on the same subject matter, which is not the case in the relationship between the TFEU and intra EU-BITs.[12]

With respect to the latter argument, it should be considered as a rather formalistic approach, or "legal gymnastics"[13] undertaken by the investment tribunals. This position, if comprehensively applied, could prevent any practical application of Art. 30 VCLT. In this context one could only agree with the International Law Commission, which stated that the "criterion of 'same subject-matter' seems already fulfilled if two different rules or sets of rules are invoked in regard to the same matter, or if, in other words, as a result of interpretation, the relevant treaties seem to point to different directions in their application by a party."[14]

It should be noted that to some extent similar arguments as in the proceedings based on intra-EU BITs were made by the EU Member States (acting as Respondent) and the EC in intra-EU Energy Charter Treaty disputes. The decisions of arbitral tribunals with

[9] Amicus Brief in *Eureko* (paras. 30 and 38), *Euram* (para. 61), and *Electrabel* (paras. 4.100-4.110); Letter to Czech Department of Finance in *Eastern Sugar* (paras. 24–26).

[10] *Achmea*, para. 276; *Euram*, paras. 254 and 263.

[11] "Article 30 Application of successive treaties relating to the same subject matter. 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs. (…) 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."

[12] *Eastern Sugar*, paras. 142 and 160-180; similarly *Eureko*, paras. 177 and 234; *Oostergetel*, paras. 74-104; *Binder*, paras. 40-42. Using a different justification, the same result was reached in *Euram*, paras. 169-183; *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Final Award 11 October 2017, para. 253. For approval of such an approach, *see* C. Binder, *A Treaty Law Perspective on Intra-EU BITs*, 17(6) Journal of World Investment & Trade 964 (2016), p. 975; For persuasive criticism concerning this conclusion, *see* Arts. 30 and 59 VCLT: A. Reinisch, *The Decisions on Jurisdiction in the Eastern Sugar and Eureko Investment Arbitrations*, 2 Legal Issues of Economic Integration 157 (2012), pp. 167-168; *see also* Basener, *supra* note 7, pp. 235-240 and 295. For the same subject matter argument, *see also* Wehland, *supra* note 7, pp. 304-305.

[13] A.A. Ghouri, *Interaction and Conflict of Treaties in Investment Arbitration*, Wolters Kluwer, Alphen aan Rijn: 2015, p. 166.

[14] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi*, A/CN.4/L.682, 13 April 2006, para. 23, *see also* paras. 117 and 254.

respect to those jurisdictional objections were, however, similar to those acting under intra-EU BITs.[15] In the most extensive discussion of these issues, the *Electrabel* tribunal stated that there is no inconsistency between the ECT and EU law.[16]

Parallel to this scepticism on the part of the arbitral tribunals with regard to the replacement of intra-EU BITs by EU law, discussions in this regard were initiated within the auspices of EU institutions. At least since 2006 the EC has presented the position that the existence of these treaties is not consistent with the common market, which is the core idea of European integration.[17] Nevertheless, due to the scepticism of many Member States toward termination of these agreements, no specific action has been agreed upon.[18] Instead, certain individual actions were taken. Between 2009 and 2011 the Czech Republic terminated intra-EU BITs with Italy, Denmark, Slovenia, Malta, Estonia and Ireland.[19] Simultaneously, since 2008 Italy initiated the practice of termination of its existing BITs.[20]

In 2011, Poland adopted the position that intra-EU BIT agreements should be terminated, and that the best solution to achieve this would be a concordant action taken by all EU Member States. Alternatively, Poland was ready to terminate those agreements either through denunciation, or on the basis of an agreement by the parties.[21] This position began to be implemented in the summer of 2017, when Poland denounced a treaty with Portugal.[22] In late 2017, Poland concluded agreements on the Amendment and Termination of its BITs with Denmark[23] and Latvia.[24] Both of the treaties, concluded through an exchange of notes, are rather brief and provide that intra-EU BITs are terminated, including their sunset clauses.[25]

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[15] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3 Award, 27 December 2016, paras. 286 and 309.

[16] *Electrabel*, paras. 5.32, 4.146, 4.166 and 4.175.

[17] *See* the letter written by the European Commission Directorate General Internal Market and Services of January 13, 2006 (2006 Commission Letter) and a note by DG Market of November 2006 quoted in *Eastern Sugar B.V (Netherlands) v. Czech Republic*, Partial Award, 27 March 2007, paras. 119-128.

[18] "Most Member States do not share the Commission's concern about arbitration risks and discriminatory treatment of investors. A clear majority of Member States prefers to maintain the existing agreements, in particular with view to the provisions on expropriation, compensation, protection of investments and investor-to-state dispute settlement" (2007 EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, January 2008, para. 15). *See also* T. Eilmansberger, *Bilateral Investment Treaties and EU Law*, 46 Common Market Law Review 383 (2009), pp. 399-400.

[19] T. Fecak, *Czech Experience with Bilateral Investment Treaties: Somewhat Bitter Taste of Investment Protection*, 2 Czech Yearbook of Public and Private International Law 233 (2011), p. 255.

[20] M. Krajewski, R.T. Hoffmann, *Research Handbook on Foreign Direct Investment*, Edward Elgar, Cheltenham: 2019, p. 203.

[21] Druk sejmowy [Sejm paper], no. 1775, 18 July 2017.

[22] Journal of Laws of 2018, item 17.

[23] Journal of Laws of 2019, item 191.

[24] Journal of Laws of 2019, item 65.

[25] Both treaties state: "The Parties to the Agreement agreed that in respect of investments made prior to the date when the Agreement mentioned in paragraph 1 terminates, none of its provisions remain in force."

Simultaneously, since at least 2012 meetings of experts representing EU Member States have been held under the auspice of the Commission, aimed at finding a common approach to the method and time frame of terminating intra-EU BITs.[26] The lack of concrete action in this respect for several years seemed to be a consequence of the conditionality advocated by some states and businesses and industry associations. In their opinion intra-EU BITs can only be terminated when a substitute equivalent procedure for enforcing investment rights would be created.[27] An illustration of this approach was the October 2015 proposal by five EU Member States to conclude an agreement among all EU Member States which would not only terminate existing intra-EU BITs, but also envisage comparable substantive and procedural protection for European investors.[28] With respect to the latter, the abovementioned states proposed the creation of a European investment court.[29]

In June 2015 the EC Commission started infringement procedures against Austria, the Netherlands, Romania, Slovakia and Sweden for the non-compatibility of its intra-EU bits with EU law and requested their termination.[30]

## 2. THE *ACHMEA* DECISION

### 2.1. Preludium

By its decision of 3 March 2016, the Federal Court of Germany (the Bundesgerichtshof, BGH) issued a reference for a preliminary ruling by the CJEU in the *Achmea* case. The BGH asked about the compatibility of a provision of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic concluded in 1991 with Arts. 18, 267 and 344 TFEU. The issue arouse as a result of Slovakia effort's to set aside a 2012 arbitral decision, issued on the basis of this Agreement, in the case of *Achmea v. Slovakia*. Slovakia brought an action to set aside that arbitral award before the Higher Regional Court in Frankfurt am Main, as the tribunal had its seat in Frankfurt. As that court dismissed the action, it appealed on a point of law to the BGH.

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[26] *See* the information available at Ask the EU, https://www.asktheeu.org/en/request/termination_of_intra_eu_bits#incoming-10643 (accessed 30 June 2020).

[27] *See e.g.* the minutes from a meeting of the representative of the European Commission (DG Financial Stability) with the Director of Businesseurope held on 15 September 2015, available at https://www.asktheeu.org/en/request/termination_of_intra_eu_bits#incoming-10643 (accessed 30 June 2020).

[28] Intra-EU Investment Treaties, Non-paper from Austria, Finland, France, Germany and the Netherlands, available at https://www.rijksoverheid.nl/ (accessed 30 June 2020).

[29] *Similarly see* T.T. Andersen, S. Hindelang, *The Day After: Alternatives to Intra-EU BITs*, 17 Journal of World Investment & Trade 984 (2016), pp.1010-1011.

[30] *Commission asks Member States to terminate their intra-EU bilateral investment treaties*, 18 June 2015, http://europa.eu/rapid/press-release_ IP-15-5198_en.htm (accessed 30 June 2020).

In its reference the BGH advocated[31] for the compatibility of intra-EU BITs with EU law. In particular, it indicated, similarly to investment arbitral tribunals which discussed the issue, that Art. 344 TFEU does not apply to investor-state dispute settlement procedures as it only concerns inter-state proceedings. Similarly, Advocate General Wathelet advocated for the compatibility of the intra-EU BITs in question with EU law.[32] He agreed with the BGH decision that disputes between individuals and Member States are not covered by Art. 344.[33] Furthermore, he presented the opinion that the arbitral tribunal constituted under the BIT is a court or tribunal within the meaning of Art. 267 TFEU. He drew this conclusion by equating those tribunals with the status of a rather unique Benelux Court, which is allowed to make preliminary references to the CJEU.[34] Finally, he stressed that "the awards made by the arbitral tribunals cannot avoid review by the national courts."[35] He did so however without explaining how this conclusion could be applied to arbitration held under the ICSID convention.[36]

## 2.2. Decision of the Court

In its judgment of 6 March 2018, the Grand Chamber of the Court of Justice stated that Arts. 267 and 344 TFEU must be interpreted as "precluding" an arbitration provision in an international agreement concluded between Member States.

Before making such a conclusion the CJEU recalled the fundamental applicable principles of EU law, in particular the principle of autonomy guaranteed by the preliminary reference procedure established by virtue of Arts. 267 and 344 TFEU. In this context the CJEU analysed the possible interaction of investment tribunals with EU law, noting that they "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" (para. 42). It found this problematic when taking into account the fact that those tribunals cannot be considered as a "court or tribunal of a member state" in accordance with Art. 267 TFEU (para. 48). This flows from the fact that they have exceptional character and that they are not integrated with the EU system of domestic courts. In particular, they cannot be equated with the Benelux Court of Justice, as it constitutes an integral element of the internal administration of justice. It distinguished between commercial and investment arbitration (paras. 54-55). Taking this into account, the CJEU indicated that adjudicative bodies created on the

[31] B. Hess, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice*, MPILux Research Paper 3 (2018) , p. 6.

[32] Opinion of A.G. Wathelet, EU:C:2017:699.

[33] *Ibidem*, para. 144.

[34] *Ibidem*, paras. 86 and 90-131; *see* the more elaborated arguments in this respect by K. von Papp, *Clash of "Autonomous Legal Orders": Can EU Member State Courts Bridge the Jurisdictional Divide between Investment Tribunals and the ECJ? – A Plea for Direct Referral from Investment Tribunals to the ECJ*, 50 Common Market Law Review 1039 (2013), pp. 1067-1076 and 1079-1081.

[35] Opinion of A.G. Wathelet, para. 239.

[36] Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965. All EU member states except Poland are the parties to the Convention.

basis of intra-EU BITs are not in conformity with EU law, as they threaten the uniform application of EU law.

In summary, the CJEU concluded with a completely different position than those presented by both the Federal Court of Justice as well as the advocate general. In fact, the lack of any reference to the opinion of the latter in the judgment "is telling."[37]

The concise character of the CJEU judgment left several questions unanswered.[38] The Luxembourg court, in its Opinion 1/17 has already clarified some of them, and with respect to the others the chance will appear as a result of the recent (later discussed) preliminary reference of the Swedish Supreme Court. Still, the lack of reference in the judgment to the Energy Charter Treaty has created substantial controversies with respect to the legality of the intra-EU application of these treaties. Furthermore, the CJEU did not reserve that its interpretation will not be retroactive, thus creating confusion as to how its decision ought to be applied to the investor-state disputes initiated (and often also concluded) before *Achmea*.

## 3. THE IMPLEMENTATION OF *ACHMEA*

Soon after *Achmea*, discussion was initiated as to its consequences for international investment law. These discussions centred on three topics:

1. whether *Achmea* also applies to BITs of EU member states with third states or investment treaties that the EU and its member states concluded with Canada, Singapore, and Vietnam;
2. whether *Achmea* also applies to the Energy Charter Treaty;
3. whether *Achmea* is only a decision which has bearing only on a single specific treaty or perhaps a set of intra-EU BITs with similar applicable law clauses such as Slovakia-Netherlands BITs or only on ISDS resolved under UNCITRAL rules.

### 3.1. CETA clarification

As already indicated, the (second) question – on the possibility of a logic application of *Achmea* to intra-EU ECT disputes – is not covered by this article. As regards the first question the CJEU has itself made a pronouncement in this respect (a year later)

[37] Hess, *supra* note 31, p. 8; *Contra* P. Koutrakos, *The Autonomy of EU Law and International Investment Arbitration*, 18 Nordic Journal of International Law 41 (2019): "The approach adopted by Advocate General Wathelet understands EU law and intra-EU BITs as two distinct legal spheres the interactions of which need not threaten the functioning of either. In developing this approach, his line of reasoning is characterized by a strong realist streak that anchors the Opinion in the practice of arbitral tribunals set up under intra-EU BITs, as well as the avoidance of grand teleological arguments. Instead, his analysis is firmly based on a literal interpretation of primary law (he refers, for instance, to the wording of Article 344 TFEU and the ensuing irrelevance of this provision to the dispute). This is a different construction of autonomy: it is about the harmonious co-existence between EU and international investment law."

[38] C. Contartese, M. Andenas, *EU Autonomy and Investor-State Dispute Settlement under inter se Agreements between EU Member States: Achmea*, 56 Common Market Law Review 157 (2019), p. 159.

in Opinion 1/17 of the resolution of investment disputes between investors and states under the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, on the other (CETA). The Court stated that the ISDS in CETA differs from the ISDS in intra-EU BITs, as it relates to agreements with third states and as a consequence does not involve considerations concerning the principle of mutual trust.[39]

### 3.2. Delimiting scope of *Achmea*

Soon after the *Achmea* judgment, some opinions were presented (mainly by arbitration practitioners) regarding the limited scope of the *Achmea* decision. It was argued that the judgment of the CJEU is not binding for international arbitration tribunals and it does not apply to ICSID arbitration.[40] According to those views the *Achmea* decision was applicable only to the treaty between the Netherlands and Slovakia.[41] The view was also expressed, that the Achmea judgment may only have a direct impact on those intra-EU BITs that contain a similar rule on the applicability of domestic laws. For all other agreements, there would be no reason to automatically assume an adverse effect on the autonomy of EU law. Rather, it was argued that the applicability of EU law needs to be examined on a case-by-case basis.[42] Such a narrow reading of a decision of the Luxemburg Court seemed to be an illustration, at least to some extent, of dissatisfaction with its ruling and the fact that it could significantly affect the further development of investment arbitration (and its legal assistance) in Europe.

Still, several commentators indicated a more general consequence of the *Achmea* decision, both on the need for termination of all of the intra-EU BITs as well as with respect to the ongoing arbitral proceedings.[43] Unsurprisingly, this was also the position taken by the EC. In its Communication "Protection of intra-EU investment", the European Commission presented an unequivocal interpretation of the consequences of *Achmea* by stating that "all investor-State arbitration clauses in intra-EU BITS are inapplicable and that any arbitration tribunal established on the basis of such clauses

[39] Opinion 1/17, 30 April 2019, ECLI:EU:C:2019:341, paras. 126-127. Earlier this position was also presented by A.G. Y. Bota, Opinion 1/17, 29 January 2019, paras. 106-114.

[40] P. Sturma, *Reform of Investment Dispute Settlement and Developments in EU Investment Law: Is There Any Future for Investment Treaty Arbitration in Europe? Some Comments in the Light of Achmea Decision*, 13 September 2018, available at: https://ssrn.com/abstract=3364013 (accessed 30 June 2020), p. 6.

[41] P. Pinsolle, I. Michou, *Arbitration: The Achmea v. Slovakia Judgment of the CJEU, Is It Really the End of Intra-EU Investment Treaties?*, 7 March 2018, available at: https://bit.ly/2WgZ1iO (accessed 30 June 2020), paras. 4-6, 16.

[42] F. Stefan, *Brace for Impact? Examining the Reach of Achmea v. Slovakia*, Kluwer Arbitration Blog, 24 June 2018, available at: http://arbitrationblog.kluwerarbitration.com/ (accessed 30 June 2020).

[43] A. Dimopoulos, *Achmea: The Principle of Autonomy and Its Implications for Intra and Extra-EU BITs,* EJIL: Talk!, 27 March 2018 https://bit.ly/303M4tX; S. Gáspár-Szilágy, *The CJEU Strikes Again in Achmea. Is this the End of Investor-State Arbitration under Intra-EU BITs?*, IELP Blog, 7 March 2018, available at: https://bit.ly/2Cztly4; Hess, *supra* note 31, p. 9; L. Ankersmit, *Achmea: The Beginning of the End for ISDS in and with Europe?*, Investment Treaty News, 24 April 2018, https://bit.ly/38Q4LoS (all accessed 30 June 2020).

lacks jurisdiction due to the absence of a valid arbitration agreement."[44] Thus the Commission took the approach, without taking into account any reasoning on the grounds of international law, that certain provisions of BITs (i.e. the arbitration clause) are not operational, despite the fact that they are contained in treaties which are still in force; which however member states were obliged to terminate.[45] Furthermore, as a result of a conclusion on the absence of a valid arbitration agreement, the Commission took the view that "national courts are under obligation to annul any arbitral award rendered on that basis and to refuse to enforce it." Thus, in the view of the Commission *Achmea* had consequences on all arbitration clauses in all intra-EU BITs.[46]

### 3.3. Declarations of EU Member States

The EC's position was repeated to a large extent in the 15 January 2019 Declaration of 22 Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union.[47] Nonetheless, the EU Member States have not managed to achieve consensus on all issues. As a result, instead of a single clear message from the EU Member States (parties to intra-EU BITs) translating the *Achmea* decision into the realm of public international law, we have witnessed a discord (if not a cacophony) of three simultaneous declarations.

While the second declaration, adopted on 16 January 2019 by Finland, Luxembourg, Malta, Slovenia and Sweden, to a large extent had similar provisions to that of the majority, there was however a considerable difference on the ECT. The third declaration was an individual statement by Hungary, which, identical to the declaration of the 22 EU Member States as regards intra-EU BITs, advocated also for a lack of inconsistency with respect to ECT–EU law relations.[48]

Apart from the issue of the ECT, all three declarations are common to a certain extent. In particular, in the operative part of the declarations the Member States indicate that they will inform arbitral tribunals about the consequences of the *Achmea* judgment in pending intra-EU investment proceedings.[49] In addition, they express the will to terminate all intra-EU BITs "by means of a plurilateral treaty or, where that is mutually

[44] Communication from the Commission to the European Parliament and the Council, *Protection of intra-EU investment*, Brussels, 19 July 2018, COM(2018) 547 final, p. 3.

[45] *Similarly see* B. Soloch, *CJEU Judgment in Case C-284/16 Achmea: Single Decision and Its Multi-Faceted Fallout*, 18 The Law and Practice of International Courts and Tribunals 3 (2019), pp. 31-32.

[46] As regards nuances of this issue, *see* H. Wehland, *The Enforcement of Intra-EU BIT Awards: Micula v. Romania and beyond*, 17 Journal of World Investment & Trade 942 (2016), p. 963.

[47] Available at: https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en (accessed 30 June 2020).

[48] According to the Investment Arbitration Reporter, the positions of Hungary and Sweden could have been linked to arbitral proceedings initiated by their State-owned companies under the ECT, *see* D. Charlotin, L.E. Peterson, *Analysis: Four Additional Takeaways from Achmea-related Declarations by EU Member States*, IA Reporter, 17 January 2019, available at: https://bit.ly/2ZqqOPK (accessed 30 June 2020).

[49] Paras. 1-2 of all three declarations.

recognized as more expedient, bilaterally."[50] According to the declaration, termination of the treaty should enter into force no later than 6 December 2019.[51]

Besides the ECT, significant differences between the declaration of the 22 Member States and the declaration and of the five appear in the preamble. Both documents stipulate that as a result of the *Achmea* judgment the investor state arbitration clauses contained in intra-EU BITs are contrary to EU law and inapplicable. Nevertheless, the declaration of the 22[52] concludes from this statement that those arbitration clauses do not produce any legal effect and that investment tribunals established on the basis of those treaties do not have jurisdiction "due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment treaty." These declarations however are non-existent in the declaration of the five. Furthermore, the declaration of the five does not refer to the provisions of the Vienna Convention on the Law of the Treaties and customary international law regarding *lex posterior*. Thus, besides the ECT, the issue of converting the consequences of the *Achmea* judgment into arbitral proceedings pending on the basis of an intra-EU BIT still in force was a pivotal controversy. The group of five seemed to hold the position that the CJEU's judgment only concerns EU law, and has no direct applicability on existing international legal rights and obligations of the Member States.[53] The problem with the position of the five EU Member States is clearly visible in the second sentence of para. 2 of their declarations. While the declaration of the 22 indicates that: "[s]imilarly, defending Member States will request the courts, including any third country, which are to decide in proceedings relating to an intra-EU investment arbitration under bilateral investment treaty, to set these awards aside or not to enforce them due to a lack of valid consent." The declaration of the five lacks the phrase "due to a lack of valid consent." As a result, it is not clear why, according to those states, domestic courts – in particular in third countries – should set aside the investment awards.

With respect to the text of the declaration of the 22, several issues are striking. Firstly, it is surprising that the declaration makes almost no reference to international customary law conflict of norms provisions in order to underscore and justify the primacy of the TFEU and its *Achmea* interpretation over BITs. This issue was touched upon only in the footnote one.[54] As a result, the declaration remains, to some extent, internally inconsistent. On the one hand it specifies particular international legal effects of the *Achmea* judgment, i.e. the lack of jurisdiction of the arbitral tribunals. On the other

[50] Para. 5 of the declaration of 22 and 5 Member States, and para. 4 of the Hungary declaration.

[51] Para. 8 of the declaration of 22 Member States declaration and 5 Member States, and para. 7 of the Hungary declaration

[52] In this respect the Hungarian declaration contains the same language as the declaration of 22.

[53] Thus this approach resembled looking at EU law rather as a constitutional (in a dualist perspective) than an international legal order.

[54] "With regard to agreements concluded between Member States, *see* judgments in 235/87 *Matteucci*, EU:C:1988:460, para. 21, and C-478/07 *Budějovický Budvar*, EU:C:2009:521, paras. 98 and 99; and Declaration 17 to the Treaty of Lisbon on the primacy of Union law. The same result follows also under general public international law, in particular from the relevant provisions of the VCLT and customary international law (*lex posterior*).

hand, however it provides a very limited explanation for these effects. The lack of a detailed and convincing "translation" of *Achmea* to the letter of international law could have – and in fact has actually had – negative consequences for ensuring the effectiveness of the CJEU judgment. What also blurred the potential aim of this declaration from the perspective of international law was the insertion of several paragraphs relating to investment protection in the EU in general. This seems to have been a concession to the authors of the 2015 declaration (Netherlands, Germany, Austria, Finland and France), which thereby held the view that the sole termination of treaties without ensuring substantial protection was insufficient.[55] The general result of this mélange was a document (actually three documents) which contained a mixture of different kinds of provisions, and thus in effect failed to put before an arbitral tribunal an unequivocal message on the position of the signatories of the relevant treaties (the TFEU and intra-EU BITs) as to how they should both be interpreted. An excellent example of this approach is paragraph 6 of the declaration of the 22, in which Member States deem to strengthen the binding force of the TFEU (sic!) by emphasizing the need to respect its Art. 19.

Notwithstanding the above, in general the declarations seem to have a twofold character. Firstly, they inform about a conflict of norms and the way they should be resolved.[56] Secondly, they are interpretative declarations, which should be taken into account in the process of their interpretation on the basis of Ar. 31(3)(a) of the VCLT.

Simultaneously to the process of drafting the EU declaration, Poland – which joined the group of 22 – has formulated individual declarations invoked when denouncing several intra-EU BITs. In a Statement of the Government dated 18 December 2018, relating to its BIT with Cyprus, it stated that:

> The Republic of Poland declares that in accordance with Article 30 paragraph 3 of the Vienna Convention on the Law of Treaties concluded on 23rd May 1969 and customary international law the arbitration clause contained in Article 9 of the Agreement between the Republic of Poland and the Republic of Cyprus for the promotion and reciprocal protection of investments which is an earlier treaty, is not applicable from 1 May 2004, i.e. the day of the accession of the Republic of Poland to the European Union, as it is not compatible with the Treaty on the Functioning of the European Union which is the later treaty. The lack of compatibility of the arbitration clauses contained in agreements on the encouragement and reciprocal protection of investments between European Union Member States with the Treaty on the Functioning of the European Union was confirmed by the judgment of the Court of Justice of 6 March 2018 in Case C-284/16 Achmea. In light of the above, the arbitral tribunals constituted under the Agreement between the Republic of Poland and the Republic of Cyprus for the promotion and reciprocal protection of investments lack jurisdiction to hear cases due to the absence of a valid arbitration consent.[57]

[55] These arguments are also still raised in the academia. *See* S. Hindelang, *The Limited Immediate Effects of CJEU's Achmea Judgment*, Verfassungsblog, 9 March 2018, available at: https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/ (accessed 30 June 2020).

[56] *Similarly see* the Statement of Dissent of Professor Marcelo G. Kohen, para. 56.

[57] *See* Journal of Laws of 2019, item 204, fn 2; for similar arguments *see* Dimopoulos, *supra* note 7, p. 91; Basener, *supra* note 7, p. 295; A. Bilanová, J. Kudrna, *Achmea: The End of Investment Arbitration as We Know It?*, 3(1) European Investment Law and Arbitration Review 261 (2018), p. 265.

The Polish declaration, while sharing the core message of the declaration of the 22, refers in a more direct way to public international law and explains the basic parameters of applying a conflict-of-norms provision. Still, both documents are based on a conviction that the intra-EU BITs and TFEU share the same subject matter.

### 3.4. *Achmea* in domestic courts

As is clear from the declarations presented, ensuring the effectiveness of the *Achmea* judgment requires uniform case law at the level of both arbitral tribunals and national courts. With respect to the latter it should be noted that on 31 October 2018 the BGH rendered a decision, finding that as the arbitration clause in bilateral investment treaties between Slovakia and Netherlands was incompatible with EU law, an arbitral award issued under this agreement must be set aside.[58] The BGH based its decision on Section 1059(2)(a) of the Code of Civil Procedure, which allows it to set aside an award rendered under an invalid arbitration agreement. It also analysed, in the context of referring to its previous jurisprudence, whether a violation of a principle of good faith had occurred, which can result in barring a party from invoking a ground for setting aside an award.[59] However, it did not find such a violation.

Different outcomes have emerged from the Swedish court in the case of the PL Holdings judgment, concerning a challenge by Poland regarding two arbitral awards (on jurisdiction and liability, and on compensation from the mid-2017s), issued on the basis of the Polish-Belgium and Luxemburg BIT.[60] Although the court of appeal recognized that the arbitral clause concerned was similar to that in the *Achmea* case,[61] it also noted that Poland – unlike Slovakia in *Achmea* – did not raise an intra-EU objection at the early stage of an arbitration proceeding.[62] Furthermore, the court reasoned that even the invalidity of the arbitration clause does not automatically imply that the awards are manifestly incompatible with Swedish public order.[63] In rejecting the Polish argument that the autonomy of EU law is an element of the Swedish public policy, the court stated that the content of the arbitral awards did not violate fundamental principles of EU law. Furthermore, the court noted that Poland could always enter into an arbitration agreement with foreign investors, thus the possible importance of the invalidity of an

[58] Aufhebung eines Schiedsspruchs: Aufhebungsgrund des Fehlens einer Schiedsvereinbarung; Unanwendbarkeit von Schiedsklauseln in einem bilateralen Investitionsschutzabkommen zwischen Mitgliedsstaaten der EU, BGH 1. Zivilsenat, 31 October 2018, I ZB 2/15, ECLI:DE:BGH:2018:311018BIZB2.15.0.

[59] *Ibidem*, paras. 42-44.

[60] Judgment of Svea Court of Appeal, 22 February 2019, available at: https://jusmundi.com/en/ (accessed 30 June 2020).

[61] *Ibidem*, para. 176.

[62] *Ibidem*, paras. 177, 232-234.

[63] "Even if the arbitral awards would be based on an arbitration clause which was manifestly incompatible with ordre public, it does not follow that the contents of the arbitral awards are incompatible with *ordre public*. The arbitral awards shall therefore not be declared invalid as being manifestly incompatible with Swedish *ordre public*" (*ibidem*, para. 201).

agreement under the BIT had limited value.[64] As to the significance of the invalidity of the arbitral clause for the setting aside the award, the Swedish court limited its influence only to the situation where such an objection was raised by the state at the proper moment in an arbitration proceeding. As a result, the Swedish court narrowed the conclusion of the *Achmea* reasoning (and EU law), conditioning its application on the assessment of a state's behaviour in arbitration proceedings.

On 12 December 2019, the Swedish Supreme Court announced that it would make a preliminary reference to the CJEU as to whether Poland could consent to intra-EU arbitration by failing to lodge a jurisdictional objection in the early stage of an arbitration proceeding.[65] As a result, the *Achmea* judgment will be commented on by the Luxembourg Court once again, after Opinion 1/17, which gives the CJEU the possibility to delimit its scope and consequences more precisely.

### 3.5 *Achmea* in arbitration awards

It is not only domestic courts who have been engaged in considering intra-EU objections to jurisdiction based on the *Achmea* decision. This decision has also been considered by several arbitral tribunals. In *Marfin Investment Group v. Cyprus* the tribunal stated that Arts. 30 and 59 VCLT, invoked by the respondent, did not apply as there was no same subject matter. The Tribunal reached this conclusion through reference to previous arbitral awards, in particular *EURAM v. Slovakia*.[66]

*UP and CD Holding Internationale v. Hungary* is another case in which the tribunal dealt with the intra-EU objection based on the CJEU decision. The tribunal underlined that, in contrast to *Achmea*, which arose under UNCITRAL proceedings, it functions as an ICSID tribunal, which as a consequence has specific features.[67] As a result, it questioned the position whereby *Achmea* could lead to depriving it of jurisdiction. Still, it did not draw attention to the fact that from the perspective of the existence of an

[64] *Ibidem*, para. 183. *See also* "Since the TFEU thus does not preclude arbitration agreements between a Member State and an investor in a particular case, a Member State is, based on party autonomy, free – even though the Member State is not bound by a standing offer as such as that in article 8 of the Achmea case or article 9 in this case –to enter into an arbitration agreement with an investor regarding the same dispute at a later stage, e.g. when the investor has initiated arbitral proceedings. An arbitration agreement and arbitral proceedings between, on the one hand, an investor from a Member State and, on the other hand, a Member State, is therefore as such not in violation of the TFEU" (para. 184).

[65] According to IIA reporter that question will be: "Do Articles 267 and 344 of the Treaty of the Functioning of the European Union, as interpreted in Achmea, mean that an arbitration agreement is invalid if it has been entered into between a member state and an investor – when an investment treaty contains an arbitration clause which is invalid because it has been entered into between two member states – if the member state, after the investor has requested arbitration, passively abstains from objecting to the jurisdiction as a result of the state's free will?, J. Dahlquis, *Swedish Supreme Court to send Achmea-related question to European Court of Justice*, IAR Reporter, 14 December 2019.

[66] *Marfin Investment Group v. The Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, 26 July 2018, paras. 584-591.

[67] *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, paras. 254-258.

arbitration agreement, the distinction between UNCITRAL arbitration rules and the ICSID convention is of secondary importance.

In *United Utilities v. Estonia* the tribunal did not agree with the respondent, the EC, and the *Achmea* decision that there existed a conflict between the TFEU and an arbitration clause in the BIT. The Tribunal adopted "as its own the reasoning developed by the tribunal in *Electrabel v. Hungary*" despite the fact that this decision preceded the *Achmea* judgment.[68] With respect to the conflict of norms argument, the tribunal felt "comforted in its conclusions by decisions of other investment arbitral tribunals, which arrived with the same findings."[69]

In *Magyar Farming Company v. Hungary*[70] the respondent claimed that by virtue of its accession to the European Union its consent to arbitration (entailed in the UK-Hungary BIT) was rendered inapplicable.[71] The Tribunal however did not agree with this stipulation and stated that there can be no retroactive revocation of consent, as it would influence the direct rights of investors (considered as third parties).[72] In addition, the tribunal stated that the treaty is still in force and that Art. 30 VCLT is not applicable as there is no same subject matter.[73] As a consequence, since the "Tribunal is not aware of the existence of provisions in the VCLT or of norms of customary international law that would govern the resolution of possible conflicts between successive treaties that do not share the same subject matter", the intra-EU BIT concerned was, according to its opinion, perfectly valid.[74] Finally the tribunal, differently than the CJEU, was not able to find a conflict between Arts. 267 and 344 TFEU and an arbitration clause. This interpretation was made without any reference to the CJEU jurisprudence regarding those provisions.[75] Finally, as regards a declaration of the EU Member States from January 2019 the tribunal, on the basis of the title only, took the view that its "wording suggests that the Member States seek to explain the legal consequences of the Achmea Decision, rather than to give an interpretation of the meaning of intra-EU investment treaties."[76]

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[68] *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019, para. 545.

[69] *Ibidem*, para. 547, *see also* paras. 549-559.

[70] *Magyar Farming Company, Kintyre KFT and Inicia ZRT v. Hungary*, ICSID Case No. ARB/17/27, 13 November 2019.

[71] *Ibidem*, paras. 170-174.

[72] *Ibidem*, paras. 222-223.

[73] In this respect the approach was taken that Art. 30 VCLT could be applied with respect to the relationship between the BIT concerned and the treaty, which would cover all provisions of the BIT in a similar fashion, *see* the logic presented in *Magyar Farming*, para. 232, citing with approval *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Final Award, 11 October 2017, RL-10, para. 253.

[74] *Magyar Farming*, para. 237.

[75] *Ibidem*, paras. 239–247.

[76] *Ibidem*, para. 216, "as the title of the 2019 Declarations demonstrates, such ineffectiveness or extinguishment is presented as a consequence of the Achmea Decision" – assessing legal consequences on the bases of the sole reading of the title seems to be difficult to reconcile with basic premises of interpretation of an international agreement.

In the most recent case – *Theodoros Adamakopoulos and others v. Cyprus* – the tribunal adhered to the position that there is not the same subject matter, as "BITs provide specifically for an alternative to determination by national courts.[77] Furthermore, the tribunal stated that there is a different test of conflict of norms under EU law and treaty law.[78] However, in contrast to the previous cases, the decision of the tribunal on jurisdiction was not unanimous. In a dissenting opinion Marcelo G. Kohen underlined that there exists a conflict of norms "provisions allowing nationals of one State to bring a claim against another State under a BIT prevent the EU Treaties from operating in the manner these treaties were envisaged."[79]

In summary, it should be noted that the *Achmea* judgment has not influenced the decisions of arbitral tribunals.[80] Awards published after March 2018 with respect to intra-EU objections to jurisdiction have not differed from the awards preceding *Achmea*. In particular, the intra EU-BITs tribunals have continued to uphold the argument that the subject matter is not the same.[81] Moreover, what is striking is that the arbitral tribunals have not considered themselves to be bound by the CJEU's decision over the conflict between the BITs and the EU Treaties.[82] Expectations that investment tribunals would, on the basis of judicial comity, decline their jurisdiction,[83] following the example of a tribunal in the *MOX Plant* dispute[84] have not been fulfilled. Legal, and perhaps non-legal considerations, following the line of awards which have reached analogous

[77] *Theodoros Adamakopoulos and others v. Cyprus*, Decision on Jurisdiction and Admissibility, 7 February 2020, ICSID Case No. ARB/15/49, paras. 168 and 171.

[78] *Ibidem*, para. 172 ("Where a tribunal refers to national law, then to the extent that national law is based on EU law this might be an indirect reference to EU law. But the fact that a tribunal might refer to national law to determine whether a claimant is a national of that state could hardly be seen as an action that would prevent the fulfilment of the EU Treaties or undermine their object and purpose. This limited potential for investment tribunals to look at EU law may have been sufficient for the purposes of EU law to say that arbitration under a BIT was precluded, and the CJEU so decided in Achmea. But Article 59 and 30 set a different standard. They require that the treaties be treaties with the same subject matter and such a standard is not met in this case").

[79] Statement of Dissent of Professor Marcelo G. Kohen, para. 39.

[80] *See also* Award of 28 January 2019 in *Sodexo Pass International SAS v. Hungary*, ICSID Case No. ARB/14/20 (unpublished); S. Perry, *Hungary hit with another intra-EU BIT award*, Global Arbitration Reporter, 5 February 2019; Award of 26 February 2019 in *Juvel Ltd and Bithell Holdings Ltd v. Poland*, ICC Case No. 19459/MHM, https://bit.ly/3jk62JC (accessed 30 June 2020).

[81] *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, 30 December 2019, para. 342; *Baywa R.E. Renewable Energy Gmbh and Baywa R.E. Asset Holding Gmbh v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, para. 273.

[82] *Magyar Farming*, paras. 207 and 209.

[83] *UP and DC v. Hungary*, ICSID Case No ARB/13/35, Award, 9 October 2018, paras. 276-279; *Eureko*, paras. 195 and 203, *see also* S. Gáspár-Szilágyi, *It Is Not Just About Investor-State Arbitration. A Look at Case C-284/16, Achmea BV*, 3(1) European Papers 357 (2018), pp. 371-372

[84] *The MOX Plant Case (Ireland v. United Kingdom)*, PCA Case 2002-01, Order, 24 June 2003. Undoubtedly, the position taken by an arbitral tribunal in that case was extraordinary and unique.

conclusions, seem to create an unsurmountable and invisible obstacle, which until now no arbiters have been willing to modify.

### 3.6. Termination of intra-EU BITs through a plurilateral treaty

On 5 May 2020 an Agreement for the termination of bilateral investment treaties between the member states of the European Union was signed.[85] However, Member States have still not managed to reach a full consensus. A "small minority" of Member States were not able to agree with the negotiated text.[86] The Agreement, owing to its complexity, deals not with intra-EU BITs in force but also with those already unilaterally terminated but which, through application of a sunset clause, are still in effect. This in particular relates to the 15 BITs denounced by Poland in 2018[87] (11 of which have already entered

[85] *See* https://ec.europa.eu/info/files/200505-bilateral-investment-treaties-agreement_en. (accessed 30 June 2020).

[86] EC announcement of 24 October 2019, available at: https://bit.ly/399cIFT (accessed 30 June 2020).

[87] Dokument wypowiedzenia Umowy między Rzecząpospolitą Polską a Republiką Cypru w sprawie popierania i wzajemnej ochrony inwestycji [Act of denunciation of the BIT between Poland and Cyprus], Journal of Laws of 2019, item 203; Dokument wypowiedzenia Umowy między Rzecząpospolitą Polską i Królestwem Holandii o popieraniu i wzajemnej ochronie inwestycji [Act of denunciation of the BIT between Poland and Netherlands], Journal of Laws of 2019, item 205; Dokument wypowiedzenia Umowy między Polską Rzecząpospolitą Ludową a Republiką Austrii w sprawie popierania i ochrony inwestycji [Act of denunciation of the BIT between Poland and Austria], Journal of Laws of 2019, item 762; Dokument wypowiedzenia Umowy między Rządem Polskiej Rzeczypospolitej Ludowej a Rządem Królestwa Szwecji w sprawie popierania i wzajemnej ochrony inwestycji [Act of denunciation of the BIT between Poland and Sweden], Journal of Laws of 2019, item 764; Dokument wypowiedzenia Umowy między Polską Rzecząpospolitą Ludową a Republiką Federalną Niemiec w sprawie popierania i wzajemnej ochrony inwestycji [Act of denunciation of the BIT between Poland and Germany], Journal of Laws of 2019, item 774; Dokument wypowiedzenia Umowy między Rządem Polskiej Rzeczypospolitej Ludowej a Rządem Zjednoczonego Królestwa Wielkiej Brytanii i Irlandii Północnej w sprawie popierania i wzajemnej ochrony inwestycji [Act of denunciation of the BIT between Poland and the UK], Journal of Laws of 2019, item 780; Dokument wypowiedzenia Umowy między Rządem Polskiej Rzeczypospolitej Ludowej a Rządem Republiki Francuskiej w sprawie popierania i wzajemnej ochrony inwestycji [Act of denunciation of the BIT between Poland and France], Journal of Laws of 2019 item 791; Dokument wypowiedzenia Umowy między Rządem Rzeczypospolitej Polskiej a Rządem Republiki Finlandii o popieraniu i ochronie inwestycji [Act of denunciation of the BIT between Poland and Finland], Journal of Laws of 2019, item 937; Dokument wypowiedzenia Umowy między Rzecząpospolitą Polską a Republiką Grecji w sprawie popierania i wzajemnej ochrony inwestycji [Act of denunciation of the BIT between Poland and Greece], Journal of Laws of 2019, item 939; Dokument wypowiedzenia Umowy między Rzecząpospolitą Polską a Republiką Litewską w sprawie wzajemnego popierania i ochrony inwestycji [Act of denunciation of the BIT between Poland and Lithuania], Journal of Laws of 2019, item 941; Dokument wypowiedzenia Umowy między Rzecząpospolitą Polską a Republiką Węgierską w sprawie wzajemnego popierania i ochrony inwestycji [Act of denunciation of the BIT between Poland and Hungary], Journal of Laws of 2019, item 950; Dokument wypowiedzenia Umowy między Rzecząpospolitą Polską a Królestwem Hiszpanii w sprawie wzajemnego popierania i ochrony inwestycji [Act of denunciation of the BIT between Poland and Spain], Journal of Laws of 2019, item 960; Dokument wypowiedzenia Umowy między Rzecząpospolitą Polską a Republiką Chorwacji w sprawie wzajemnego popierania i ochrony inwestycji [Act of denunciation of the BIT between Poland and Croatia], Journal of Laws of 2019, item 1163; Dokument wypowiedzenia Umowy między Rządem Rzeczypospolitej Polskiej a Rządem Republiki Bułgarii w sprawie wzajemnego popierania i ochrony inwestycji [Act of denunciation of the BIT between Poland and Bulgaria], Journal of Laws of 2019, item 1485.

into force)[88] and one in 2019.[89] Furthermore, the Agreement does not cover those BITs that were terminated bilaterally. As mentioned previously, before the *Achmea* decision Poland concluded two such agreements, with Denmark and Latvia. After the judgment of the CJEU similar agreements were concluded by Poland with Estonia (19 March 2018),[90] the Czech Republic (11 April 2018),[91] and Romania (18 June 2018).[92]

The text of the plurilateral treaty was known well before 5 May 2020, as the draft version was leaked.[93] The Agreement envisages the termination of the sunset clauses of the previously denounced and terminated intra-EU BITs listed in a separate annex.[94] According to Nikos Lavranos, the termination of the sunset clause without amendment of the previous BIT, and deleting the sunset clause, is in contravention with the VCLT.[95] Such an approach is difficult to reconcile with the basic premises of a treaty of law. States may, in a treaty, grant rights to individuals and simultaneously may take away those rights when terminating the treaty.[96] The main idea of a sunset clause is

[88] With Austria, Cyprus, Croatia, Finland, Germany, Netherlands, France, Greece, Spain, Sweden, and the UK.

[89] Dokument wypowiedzenia Umowy między Rzecząpospolitą Polską a Republiką Słowenii o wzajemnym popieraniu i ochronie inwestycji [Act of denunciation of the BIT between Poland and Slovenia], Journal of Laws of 2019, item 948.

[90] Porozumienie z dnia 19 marca 2018 r. między Rzecząpospolitą Polską a Republiką Estońską o zmianie i zakończeniu obowiązywania Umowy między Rzecząpospolitą Polską a Republiką Estońską o wzajemnym popieraniu i ochronie inwestycji [Agreement of 19 March 2018 between the Republic of Poland and the Republic of Estonia on the Amendment and Termination of the Agreement between the Republic of Poland and the Republic of Estonia on the Reciprocal Promotion and Protection of Investments], Journal of Laws of 2019, item 264.

[91] Porozumienie z dnia 11 kwietnia 2018 r. między Rzecząpospolitą Polską a Republiką Czeską o zmianie i zakończeniu obowiązywania Umowy między Rzecząpospolitą Polską a Republiką Czeską o popieraniu i wzajemnej ochronie inwestycji [Agreement of 11 April 2018 between the Republic of Poland and the Czech Republic on the Amendment and Termination of the Agreement between the Republic of Poland and the Czech Republic on the Reciprocal Promotion and Protection of Investments], Journal of Laws of 2019, item 1502.

[92] Porozumienie z dnia 18 czerwca 2018 r. między Rządem Rzeczypospolitej Polskiej a Rządem Rumunii o zakończeniu obowiązywania Umowy między Rządem Rzeczypospolitej Polskiej a Rządem Rumunii w sprawie popierania i wzajemnej ochrony inwestycji [Agreement of 18 June 2018 between the Government of Republic of Poland and the Government of Romania on Termination of the Agreement between the Government of the Republic of Poland and the Government of Romania on the Reciprocal Promotion and Protection of Investments], Journal of Laws of 2019, item 793.

[93] *See* http://arbitrationblog.kluwerarbitration.com/wp-content/uploads/sites/48/2019/12/a-draft-agreement-has-been-leaked.pdf (accessed 30 June 2020).

[94] Preambular recital VIII states the following: "Noting that certain intra-EU bilateral investment treaties, including their sunset clauses, have already been terminated bilaterally, and that other intra-EU bilateral investment treaties have been terminated unilaterally and the period of application of their sunset clauses has expired."

[95] N. Lavranos, *The EU Plurilateral Draft Termination Agreement for All Intra-EU BITs: An End of the Post-Achmea Saga and the Beginning of a New One*, Kluwer Arbitration Blog, 1 December 2019, available at: https://bit.ly/3jegiTX (accessed 30 June 2020).

[96] "Under general treaty law and the law on State responsibility, States can amend or terminate treaties which provide rights for individuals. Individuals enjoy any benefit bestowed by treaty with the continued

that it applies only with respect to unilateral termination of a treaty. In the situation of bilateral termination, the presumption should be however that it also covers the sunset clause unless expressly stating otherwise.[97]

Furthermore, the draft treaty seems to repeat some provisions of the declaration of the 22, by stating in the draft Art. 4(1) that:

> The Contracting Parties hereby confirm that Arbitration Clauses are contrary to the EU Treaties and thus inapplicable. As a result of this incompatibility between Arbitration Clauses and the EU Treaties, as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member State of the European Union, the Arbitration Clause in such a Bilateral Investment Treaty cannot serve as legal basis for Arbitration Proceedings.[98]

This provision has a declaratory character and should be read in conjunction with the preamble, which states that this Agreement pronounces a common understanding "between the Parties to the EU Treaties and intra-EU bilateral investment treaties that, as a result, such a clause cannot serve as legal basis for Arbitration Proceedings" (recital 6). This seems to suggest that the drafters of the treaty consider it as a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions in accordance with Art. 31(3)(a) VCLT. The International Law Commission, in its recently adopted conclusions in this respect, stated that: "[a]n agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept."[99] It is also worth noting that this provision covers all investor-State arbitration proceed-

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agreement of the States parties; […]"; Aide Memoire of the Office of the UN Secretary General, Denunciation of the ICCPR by the Democratic People's Republic of Korea, 23 September 1997, para. 13, available at: https://treaties.un.org/doc/Publication/CN/1997/CN.467.1997-Frn.pdf (accessed 30 June 2020). The fact that human rights treaties serve a community interest cannot impede the States parties from terminating the treaty by consent. Community interests as defined by treaties remain dependent on their creators as the masters of the treaty […].'); "The fact that the treaty can be amended or altered by the parties, even to the extent of taking away the investor's rights, does not alter the nature of the investor's rights that exist while the treaty is in force", D. McRae, *Countermeasures and Investment Arbitration*, in M. Kinnear et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID*, Wolters Kluwer, Alphen aan Rijn: 2015, p. 497; T. Voon, A. Mitchell, J. Munro, *Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights*, 29(2) ICSID Review 451 (2014), p. 467.

[97] C. Titi, *Most-Favoured-Nation Treatment, Survival Clauses and Reform of International Investment Law,* 33(5) Journal of International Arbitration 425 (2016); T. Voon, A.D. Mitchell, *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law*, 31(2) ICSID Review 413 (2016).

[98] With respect to the potentially unlimited temporal scope of this provision, it is worth noting the limitations contained in Art. 6, which states that "this Agreement shall not affect Concluded Arbitration Proceedings. Those proceedings shall not be reopened."

[99] Conclusion 10 para. 1, first sentence of Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties 2018, adopted by the International Law Commission at its 17th session in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10, para. 51).

ings based on intra-EU bilateral investment treaties, including those under the ICSID Convention in accordance with preambular recital VII. States which are parties to arbitration proceedings shall inform the arbitral tribunal in accordance with Art. 7, by using precisely the provisions of Art. 4(1) (repeated in Annex C to the agreement). In practice, this provision can apply to 31 pending (as of December 2019) intra-EU BIT arbitrations.[100]

Still, the applicability of these provisions to pending arbitration proceedings can evoke some concerns, particularly after the recent CJEU opinion on CETA, where the tribunal stated that "in the light of the requirement of independence of the CETA Tribunal and Appellate Tribunal, that interpretations determined by the CETA Joint Committee have no effect on the handling of disputes that have been resolved or brought prior to those interpretations. If it were otherwise, the CETA Joint Committee could have an influence on the handling of specific disputes and therefore participate in the ISDS mechanism."[101] This approach is a novelty. The issue of the interpretation of the treaty adopted during the arbitration proceeding had already appeared in the NAFTA case of *Pope & Talbot v. Government of Canada*. Nevertheless, in that case the arbitral tribunal evaluated only whether the decision of the NAFTA Commission was an illegal amendment rather than an interpretation of a treaty.[102] It did not analyze whether the note of the NAFTA Commission violated its independence as a judicial organ.[103] From the perspective of the rights of individuals, the ECHR considered that a radical and unpredictable change in the interpretation of domestic law and its retroactive application by domestic courts could lead to violations of fundamental rights protected by a convention.[104] Along the same line, Anathea Roberts pointed out that "permitting unreasonable, retroactive interpretations would strike a clear blow to the credibility of

[100] S. Gáspár-Szilágyi, M. Usynin, *The Uneasy Relationship between Intra-Eu Investment Tribunals and the Court of Justice's Achmea Judgment*, CEVIA Working Paper Series, Issue 4/2019, pp. 31-36.

[101] Opinion 1/17, para. 236; The Tribunal continued: "Although that safeguard of no retroactive effect and no direct effect on pending cases is not expressly provided for in Article 8.31.3 of the CETA, it must again be observed that the consent of the Union to any decision specified in Article 8.31.3 of the CETA will have to comply with EU primary law and, in particular, with the right to an effective remedy enshrined in Article 47 of the Charter. Accordingly, Article 8.31.3 of the CETA cannot be interpreted, having regard to Article 47, as permitting the Union to consent to decisions on interpretation of the CETA Joint Committee that would produce effects on the handling of disputes that have been dealt with or are pending" (para. 237).

[102] *Pope & Talbot v. Government of Canada*, Award in Respect of Damages, 31 May 2002, para. 47.

[103] Note however that from the letter directed by the tribunal to the parties it seems that it considered to some extent the appropriateness of retroactive interpretation: "[w]ithout pre-empting at this time the implications properly to be drawn it appears to the Tribunal that if the Commission viewed its Interpretation to have retroactive effect on this case, its actions could be viewed as seeking to overturn a treaty interpretation already made by a NAFTA Chapter 11 Tribunal, Canada acting both as disputing party and as a member of a reviewing body", para 13; This line seemed to be also applied by the ICSID Annulment Committee in *Edenred S.A. V. Hungary*, ICSID Case No. ARB/13/21 (unpublished), *see* T. Jones, *ICSID panel declines to revisit intra-EU award*, Global Arbitration Reporter, 13 February 2019.

[104] ECtHR, *Cantoni v. France* (App. No. 17862/91), 11 November 1996.

investment treaty commitments and reduce the role of investment tribunals to mere agency, precisely in the circumstance in which tribunals have the strongest claim to trustee like status in resolving specific investor-state disputes."[105] Thus, the crux of the matter would be the assessment whether the interpretation, which has retroactive effect, presented by the member states in the Agreement is a radical and unpredictable change of situation for the foreign investors protected by the intra-EU BITs. The main problems in this respect flow from the lack of a uniform point of reference to evaluate this issue. As mentioned, even before the *Achmea* decision the EC and certain (mainly Eastern European) EU Member States presented clear arguments concerning the lack of coherence of intra-EU BITs with EU law and its consequences for the possibility of raising investment claims. Simultaneously, certain other member states (as the *Achmea* proceedings suggest) were of the opposite view.[106]

An argument that can help to resolve this conundrum can be made that the subsequent agreement inserted into Art. 4 of the Agreement is of a specific character. It does not aim to contribute to the meaning of particular provisions of the BIT, but rather to explain the consequences, under Art. 30(3) VCLT, of identified conflict of norms that stem from the coexistence between intra EU-BITs and the TFEU. Thus, it is not the retroactive effect that would be anticipated by the authors of the treaty, but rather confirmation that a conflict which has an objective character has a direct consequence in the inapplicability of arbitration clauses, and as a result leads to the lack of possibility of entering into an arbitration agreement between the state and an investor.[107]

This line of thinking until now was not only not shared by the investment tribunals, but also not noticed by them in the argumentation of the EC and certain EU Members States. In general, arbitral awards do not seem to distinguish between the issue of applicability of certain provisions and the validity of a treaty as a whole.[108]

Furthermore, the Agreement also refers to pending arbitration proceedings by providing transitional measures for those investors who have not challenged measures which are subject to disputes before national courts. The envisaged scenario in these situations is twofold. The first solution, applicable if the investment proceeding is suspended pursuant to a request by the investor, is a structural dialogue between the State and an investor (Art. 9). This is a hybrid of mediation and conciliation procedures under

[105] A. Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States,* 104 American Journal of International Law 179 (2010), pp. 213-214.

[106] Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands, the Republic of Austria and the Republic of Finland, *see* Opinion of A.G. Wathelet, EU:C:2017:699, paras. 34-36.

[107] S. Centeno Huerta, N. Kuplewatzky, *On Achmea, the Autonomy of Union Law, Mutual Trust and What Lies Ahead*, 4(1) European Papers 61 (2019), pp. 70 and 77. However, "[w]hen the parties have given their consent, no party may withdraw its consent unilaterally by direct or indirect means" (C. Schreuer, *Denunciation of the ICSID Convention and Consent to Arbitration*, in: M. Waibel et al. (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality*, Wolters Kluwer 2010, p. 363.

[108] *Magyar Farming*, para. 221, *United Utilities v. Estonia*, para. 559.

international law, in which impartial facilitator is designated by common agreement of the investor and the party. On one hand they organize the settlement negotiations, and on the other they make a final proposal for an amicable settlement. This proposal is not mandatory. Nevertheless, a lack of acceptance of the facilitator's proposal should be justified. The second solution, applicable if the investor withdraws from an arbitration proceeding and waives all claims pursuant to BIT, is access to judicial remedies under national law (Art. 10).

These two remedies seem to express the conviction of the drafters of the need to ensure effective legal protection to foreign investors in a situation where the arbitral proceeding was initiated before *Achmea* and cannot lead to an effective result. However, whether these remedies will be of practical value, from the perspective of the investors, is not clear, as they neither provide a binding solution (structural dialogue) nor do they envisage something extraordinarily new (domestic courts).

Although, it is uncommon in a treaty aimed at termination, the Agreement also provides a dispute settlement clause. According to Art. 14, if a dispute between the Parties cannot be settled amicably it can be submitted to the CJEU, as this provision constitutes a special agreement between the Parties within the meaning of Art. 273 TFEU. This provision affords the Member States a means of resolving those of their disputes which fall within the jurisdiction of the EU judicature.[109] According to CJEU case law, in the application of this provision it is irrelevant whether the consent of the Member States was given before or after the dispute arose.[110] Art. 273 TFEU requires also that the "dispute" brought before the Court "relates to the subject matter of the Treaties." The CJEU stated in this context that the "phrase 'related to' must be understood as a link rather than a requirement that the subject matter be the same."[111] Thus although there is a clear link between the Agreement and the subject matters of the TFEU, doubts can be expressed bas to which particular provisions this dispute settlement clause could be applied.[112]

As regards the final provisions, it is striking that the Agreement will enter into force after just a second ratification, a solution unusual with respect to multilateral treaties. Still, such an approach can be justified. A requirement for any further ratifications could create an artificial situation, whereby the ratification of the Agreement by two Member States which are parties to an intra-EU BIT would not in fact terminate the BIT. In such a scenario they would have to wait for a sufficient number of others to

[109] Case C-648/15 *Republic of Austria v. Federal Republic of Germany* [2017], ECLI:EU:C:2017:664, para. 29; C-370/12 *Thomas Pringle v. Government of Ireland and Others* [2012], EU:C:2012:756, para. 172.

[110] *Pringle*, para. 172.

[111] Case C-648/15 *Republic of Austria v. Federal Republic of Germany* [2017], ECLI:EU:C:2017:664, para. 23.

[112] Draft preambular para. 13 explicitly states that "disputes between the Parties concerning the interpretation or application of this Agreement pursuant to Article 273 TFEU shall not concern the legality of the measure that is the subject of investor-State arbitration proceedings based on a bilateral investment treaty covered by this Agreement."

adhere to the Agreement for it to have legal effect in their bilateral relations. Thus, providing such a low number of ratifications for the entry into force of the Agreement makes it possible to avert solutions which would grant unjustified, under international law, rights to third states of a particular BIT.

Another uncommon solution, in particular with respect to treaties of termination, is providing the possibility of provisional application. The unusual nature of this solution flows from the fact that such provisional application can be relatively easily terminated. Thus, in the case of the treaty on the termination of other agreements questions arise as to what would be the consequence if a party provisionally applying a treaty notified its intention and does not become a party to it.[113] Still, there is such a possibility – which would also contravene EU law – although it seems to be rather unlikely.

## CONCLUSIONS

Full implementation of the consequences of the *Achmea* judgment is a very complex task, entangled in political and legal controversies concerning intra-EU BITs which have been present in the relations of EU member states for more than a decade. Declarations of EU Member States as of January 2019 showed that as yet not all controversies are resolved. On a more general level the picture is even less clear, as the implementation process is simultaneously entwined in two other significant debates: the specifics of the rights of investors under international investment law, and the relationship between EU law and international law. Against this complex background, the awards of investment arbitral tribunal, which are rarely homogenous with respect to other issues, demonstrate a surprisingly uniform position on intra-EU objections to their jurisdiction. Thus, the standard of the judicial comity established by the arbitral tribunal in the *MOX Plant* case is currently being abolished by investment arbitral tribunals, which in fact are ignoring the CJEU decision through a surprisingly formalistic approach (for example as to the application of Art. 30 VCLT) – one which is not common in the interpretative practice of these bodies. Such an approach has found support by those who invoke newly refreshed arguments on the need for investment

[113] "Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization is terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty." *See* Guideline 9 para. 2, draft Guide to Provisional Application of Treaties, adopted by the Commission on first reading; *see also* the commentary "The Commission decided not to introduce a safeguard in relation to unilateral termination of provisional application by, for example, applying mutatis mutandis the rule found in paragraph 2 of article 56 of the 1969 and 1986 Vienna Conventions, which establishes a notice period for denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal. The Commission declined to do so out of concern for the flexibility inherent in article 25 and in view of insufficient practice in that regard." (ILC Report, A/73/10, p. 219).

arbitration in view of the problems of domestic courts.[114] However, these arguments ignore the systemic problems of the ISDS, as to which general agreement between states exists.[115] That is why the EU pursues a Multilateral Investment Court initiative, which is based on a presumption that investment disputes (outside the EU) should be solved by an international organ, whose structure, members and procedures resemble those of national courts.[116]

[114] "Potential allies outside the EU legal system for promoting respect for the rule of law in the EU Member States include not only international organizations, such as the Council of Europe, the OECD and the United Nations, but also less obvious (and more controversial) candidates, such as ad hoc arbitral tribunals constituted under international investment protection treaties to decide the claims of investors against Member States of the EU" (W. Sadowski, *Protection of the rule of law in the European Union through investment treaty arbitration: is judicial monopolism the right response to illiberal tendencies in Europe?*, 55 Common Market Law Review 1025 (2018), p. 1027).

[115] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), UNCITRAL, A/CN.9/964, 6 November 2018, paras. 40, 53, 63 and 83.

[116] Submission from the European Union and its Member States, 24 January 2019, A/CN.9/WG.III/WP.159/Add.1, UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), paras. 1-2, 6-15; Ł. Kułaga, *A Brave, New, International Investment Court in Context: Towards a Paradigm Shift of the ISDS*, 38 Polish Yearbook of International Law 115 (2018), pp. 136-140.