Achmea: Groundbreaking or Overrated?
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This article discusses the potential implications of the CJEU’s Achmea judgment regarding intra-EU BITs, extra-EU BITs, the ECT and future EU investment agreements. While it is too early to forecast the exact impact of the Achmea judgment, the authors show that the potential intensity varies depending on whether it is an intra- or extra-EU situation. Moreover, regarding the recognition and enforcement phase, it also depends on whether ICSID or non-ICSID awards are involved. In addition, the authors highlight the inherent contradiction in the EU’s approach of abolishing ISDS within the EU, while at the same time promoting ISDS – albeit in the form of the ICS – at the global level.

Der Aufsatz analysiert die möglichen Folgen des Achmea-Urteils des EuGH sowohl im Hinblick auf bilaterale Investitionsschutzabkommen zwischen den Mitgliedsstaaten (intra-EU BITs) als auch auf derartige Abkommen mit Drittstaaten (extra-EU BITs). Auch die Auswirkungen auf den Energiecharta-Vertrag (ECT) und zukünftige EU Investitionsschutzabkommen werden dargelegt. Obwohl die Folgen des Achmea-Urteils noch nicht genau absehbar sind, zeigen die Autoren auf, dass die Intensität der Folgen davon abhängt, in welchem Umfang der EuGH einen intra- oder extra-EU Fall handelt. Bezüglich der Anerkennung und Vollstreckung von Schiedsgerichtsurteilen muss zwischen ICSID-Schiedssprüchen und Nicht-ICSID-Schiedssprüchen unterschieden werden. Darüber hinaus weisen die Autoren auf den inneren Widerspruch der Politik der Europäischen Kommission hin, die einerseits die Investoren-Staat-Streitbeilegungsregeln (ISDS) innerhalb der EU abschaffen will, andererseits solche Regeln – wenn auch in abgewandelter Form – (ICS) international vorantreibt.

I. Setting the Scene

The long awaited Achmea (1) judgment of the Court of Justice of the EU (CJEU) rendered in March 2018 is the very first judgment in which the CJEU had the opportunity to decide specifically on the (in)compatibility of the Investor-State-Dispute Settlement (ISDS) provision, (2) which is contained in practically all of the more than 3,300 Bilateral Investment Treaties (BITs) concluded worldwide. (3) Admittedly, the CJEU already had the opportunity to decide on the distribution of competences between the EU and its Member States in its Opinion 2/15 (4) regarding the EU-Singapore Free Trade Agreement (FTA). In that opinion, the CJEU determined that the ISDS provisions and non-direct foreign investments are mixed competences and thus are shared between the EU and the Member States. (5) However, the CJEU explicitly refrained from deciding on the (in)compatibility of the ISDS provisions in that FTA with EU law. (6)

Thus, the Achmea judgment of the CJEU is a ground-breaking (richtungweisend) decision indicating the general approach of the CJEU regarding investment treaties and the arbitration provisions contained therein. Despite the fact that – as will be discussed in more detail below – the Achmea judgment leaves many questions unanswered, it seems possible to draw some conclusions and make a few educated predictions regarding the potentially wider implications of this decision.

Obviously, it is impossible within the confines of this contribution to analyse all aspects in detail. Instead, we will analyse the Achmea judgment regarding different contexts and highlight the main consequences.

The background of the Achmea case is as follows: Achmea, a Dutch health insurance company, initiated arbitration proceedings against Slovakia based on the Netherlands-Czechoslovakia BIT of 1991 (7) after Slovakia had adopted a legislation that re-nationalised the health insurance sector and thus effectively expropriated Achmea’s investment. Frankfurt was the seat of the arbitration. In 2012, Achmea won the arbitration proceedings and was awarded 22 million EUR plus interest. (6) Subsequently, Slovakia initiated setting aside proceedings before the Higher Regional Court of Frankfurt (Oberlandesgericht Frankfurt) claiming that the arbitral tribunal lacked jurisdiction – this intra-EU BIT no longer being applicable since Slovakia’s accession to the EU – and in any case, EU law prohibits the use of international arbitration within the EU. The Court rejected said application, (9) which was followed by an appeal by Slovakia before the German Federal Court of Justice (Bundesgerichtshof). Even though it was not convinced by the Slovak arguments, the Bundesgerichtshof nonetheless felt obliged to request a preliminary ruling from the CJEU to answer the question of the (in)compatibility of ISDS provisions in intra-EU BITs with EU law. (10)

In essence, the CJEU declared the arbitration provision in Netherlands-Czechoslovakia BIT
to be incompatible with EU law on the ground that arbitral tribunals operate “outside” the domestic legal system of the Member States and, therefore, cannot request preliminary rulings from the CJEU whenever EU law is at issue. (11) Consequently, the uniformity and consistency of EU law cannot be preserved. With a Decision of 31.10.2018, the Bundesgerichtshof duly implemented the CJEU’s Achmea judgment and set aside the Achmea award. Moreover, the Bundesgerichtshof did not allow an appeal to the German Constitutional Court, which means that the Achmea award has been definitely set aside. (12)

II. No Future of Intra-EU BITs Post Achmea – The Black Tuesday Effect

From the outset, it should be emphasized that the CJEU in Achmea only declared the specific ISDS provision contained in that intra-EU BIT to be incompatible with EU law. The CJEU did not declare the whole BIT incompatible. Nor did the CJEU refer to the ISDS provisions contained in the other 190 intra-EU BITs or the Energy Charter Treaty (ECT). Thus, prima facie, one could argue that the consequences of the Achmea judgment are limited to that case and to the specific BIT involved. This is particularly so considering the fact that most of the ISDS provisions in the other BITs are worded differently – either because they do not mention at all which law is applicable or they only refer to international law. (13)

However, commentators like Burkhard Hess reject this distinction as being “formalistic” and argue that the Achmea decision applies to ISDS clauses in all intra-EU BITS irrespective of whether they require application of EU law or not. (14) Indeed, considering the de facto general binding effect of EU judgments, one could certainly argue that the Achmea judgment and its dispositive parts apply to all ISDS provisions contained in other intra-EU BITs (and potentially the one contained in the ECT for intra-EU disputes) – irrespective of their different formulations.

Whether or not one agrees with Hess, the fact remains that all international arbitral tribunals established on the basis of any intra-EU BIT cannot request preliminary rulings from the CJEU and thus, operate “outside” the control of the CJEU. (15) This alone would be a sufficient reason for the CJEU to consider all ISDS provisions in all intra-EU BITs to be equally incompatible with EU law. Eventually, the CJEU will get the opportunity to authoritatively decide this question.

In any event, under Art. 351 TFEU (17) Member States are required to resolve any incompatibilities between their international agreements entered into before acceding to the EU and EU law. We leave aside the question of whether Art. 351 TFEU is indeed applicable (directly or analogously) to intra-EU BITs, considering the fact that its wording refers to international obligations with third States. (18) Indeed, most intra-EU BITs were concluded as extra-EU BITs in the 1980s and 1990s before the respective Member States acceded to the EU, which subsequently transformed them into intra-EU BITs. Arguably, this supports the view that Art. 351 TFEU is – at least analogously – applicable to intra-EU BITs.

If Art. 351 TFEU is considered to be applicable, post-Achmea, Member States are required to either renegotiate their intra-BITs or terminate them altogether. Indeed, in a letter to the Dutch Parliament dated 26.4.2018, (19) the Dutch Government stated that it feels obliged after the Achmea judgment to terminate all its intra-EU BITs and also to examine the consequences for intra-EU ECT disputes. (20)

In addition, the European Commission has reiterated its position that all intra-EU BITs must be terminated in its latest Communication on Protection of Intra-EU investment dated 19.7.2018. (21) The European Commission considers the legal protection offered by EU law to European investors to be as good as that offered by the intra-EU BITs and views the domestic courts of the Member States in conjunction with the CJEU to be the only appropriate dispute settlement fora. (22)

However, to the best knowledge of the authors, no intra-EU BIT has been terminated post-Achmea so far. Indeed, for example, the Netherlands-Poland BIT, which could have been terminated by 1.8.2018 has – according to the official Dutch treaty website – not been terminated and thus, has been automatically extended until 2029. (23)

In any event, if all intra-EU BITs are indeed terminated at some point, European investors can seek protection for their investments only before domestic courts of the Member States. However, as the European Commission itself regularly acknowledges in its annual Judicial Monitor, the judicial systems in many Member States is malfunctioning, corrupted and not independent. (24) This has recently also been confirmed by the European Parliament, which adopted a resolution triggering the Article 7 procedure against Hungary. (25) Poland is similarly facing an Article 7 procedure because of the Government’s direct interference with the functioning of the Polish Supreme Court and the judicial system generally. (26) Moreover, Bulgaria and Romania have been under special strict supervision by the European Commission for several years already due to the persisting and widespread corruption problems. (27)

III. Achmea Creates Risks for Extra-EU BITs as well

The attention thus far regarding the consequences of the Achmea judgment has primarily focused on the intra-EU BITs. This is understandable. However, one needs to look at the approximately 1,200 extra-EU BITs which the Member States have concluded with third
States as well.

Prima facie, the so-called “grandfathering” Regulation 1219/2012 ensures the continued existence of those extra-EU BITs. (28) These BITs continue to remain in force until they are replaced by EU BITs or FTAs (with an investment protection chapter) with the third State concerned. For example, if and when the FTA between the EU and Singapore enters fully into force (including the separate investment protection chapter), all the BITs which Singapore has concluded with the Member States would be replaced by the EU-Singapore FTA. (29) That way, a clear and seamless transition would take place, which would ensure maximum legal certainty and protection for foreign investors and third States.

However, it will take many decades before all 1,200 extra-EU BITs have been replaced by EU investment agreements. Consequently, the ISDS provisions which are contained in virtually all extra-EU BITs will remain applicable. Accordingly, it is possible that an arbitral tribunal established by, for example the Germany-China BIT, to decide a dispute of a Chinese investor against Germany is required to interpret or apply EU law without being able to request a preliminary ruling from the CJEU. This scenario is essentially similar to the Achmea situation and thus would probably raise the same objections by the CJEU.

Nevertheless, as mentioned above, many ISDS provisions in extra-EU BITs do not refer to EU law as applicable law, therefore, EU law may be much less relevant than it is in intra-EU BIT disputes.

Nonetheless, the fact remains that arbitral tribunals may be faced with EU law issues and decide them as they see fit without the CJEU being able to ensure the consistency and uniformity of EU law, which is of major importance to the CJEU.

Besides, the continued availability of ISDS provisions for non-EU investors against EU Member States would give them more protection than is available for European investors who want to bring a claim against EU Member States. This preferential treatment of third State investors would give them an advantage, which is difficult to defend.

The contradictory approach of the European Commission on this point is particularly telling. As mentioned above, whereas the European Commission is pushing for the immediate termination of all intra-EU BITs with their ISDS provisions, the same European Commission has been negotiating EU FTAs with ISDS provisions included – albeit now in the modified form of the Investment Court System (ICS). (30)

It would be much more consistent, if the European Commission would not include any ISDS provisions in the EU FTAs. Indeed, albeit for reasons of avoiding the competence issue, that is now the case regarding the recently concluded FTA with Japan (31) and the FTAs being currently negotiated with New Zealand and Australia. (32)

In any event, the fate of the ICS is currently pending before the CJEU. In exchange for giving its consent to sign the Comprehensive Economic and Trade Agreement (CETA), Belgium (on behalf of Wallonia) has requested the CJEU to determine whether the ICS system is compatible with EU law (Opinion 1/17). (33) It remains to be seen what the CJEU will decide. (34)

Equally, it is possible that sooner or later the CJEU will also decide on the (in)compatibility of the ISDS provisions in extra-EU BITs. This could be particularly the case when it comes to the recognition and enforcement of extra-EU BITs awards before domestic courts of the Member States, which could ask the CJEU to decide this issue. Besides, it is also possible that at some point in time the question of the conformity of the grandfathering Regulation with the TFEU provisions could be brought before the CJEU, thereby undermining the legal certainty regarding the continued existence of the 1,200 extra-EU BITs.

IV. Achmea Complicates the Future of EU Investment Treaties with Non-EU Member States

As noted above, the Achmea decision was taken purely in an intra-EU context and thus one may reasonably conclude that ISDS clauses in future EU investment treaties between the EU and third countries would not be affected. The Commission has already endorsed this conclusion, and emphasizes that “different legal considerations apply to external EU investment policies”. (35) However, the reasoning of the CJEU suggests otherwise, as explained below.

1. Opinion 2/15 of the CJEU

The far-reaching implications of the Achmea judgment in relation to third countries also become evident when juxtaposed with Opinion 2/15 of the CJEU concerning the EU-Singapore FTA. As mentioned above, the CJEU held that the provisions of the FTA dealing with non-direct foreign investment and ISDS do not fall within the competence of the EU and, therefore, the FTA could not be concluded without the participation of the Member States. (36) However, agreements concluded jointly by the EU and the Member States with third countries might potentially lead to investors invoking the protections in relation to intra-EU disputes, as we have witnessed in the case of the ECT. In order to reconcile
Opinion 2/15 with Achmea, any joint participation of the EU and the Member States in such FTAs would thus require a clear and express exclusion of intra-EU disputes from being submitted to tribunals under the ISDS provisions.

The above course of action is naturally subject to the decision of the Commission to continue with the ISDS provisions in FTAs with third countries instead of replacing it with the ICS as has already been done in CETA, EU-Vietnam FTA, EU-Singapore FTA and EU-Mexico FTA. In this context, Opinion 2/15 and the Achmea judgment are particularly interesting from the standpoint of the competence of the EU. In Opinion 2/15, the CJEU concluded that the EU does not have the exclusive competence to sign off on provisions relating to dispute settlement between investors and States. (37) By contrast, in Achmea, the CJEU reaffirmed its long-held position (38) that the EU has the competence to establish a court under an international agreement with decisions that are binding on all EU institutions, including the CJEU, as long as the autonomy of the legal order is respected. (39)

Admittedly, the stance of the CJEU in Opinion 2/15 was not particularly in relation to the validity of ISDS provisions under EU law. Nevertheless, this development could significantly influence EU’s negotiation strategy in the future with third countries, particularly with respect to the Multilateral Investment Court (MIC) proposals. The Commission has already removed ISDS/ICS provisions from the negotiation agendas for FTAs with Australia and New Zealand. Furthermore, investment protection provisions have been entirely removed from the EU-Japan Economic Partnership Agreement (EPA).

2. The Energy Charter Treaty

The question of whether the Achmea judgment also covers the ECT has evoked starkly divergent reactions from the arbitration community. (40) Some commentators have highlighted that there is no reason why intra-EU disputes under the ECT should be treated any differently from disputes under intra-EU BITs. (41) On the other hand, some claim that since the EU itself is a party to the ECT, the operation of the ECT remains unaffected by the Achmea decision. Unsurprisingly, the Commission maintains that the ISDS clause in Art. 26 ECT applies only between the EU and third countries, and not among the EU Member States inter se. (42)

However, the uncertainty caused by Achmea might not last for very long. Spain has already requested the Swedish Court of Appeal to seek a preliminary reference from the CJEU regarding the compatibility of Art. 26 ECT with EU law. (43) The Swedish court has stayed the enforcement of the award but is yet to take a decision regarding Spain’s request.

As the Vattenfall tribunal recently explained in a very extensive and detailed analysis, the rights and obligations emanating from the ECT clearly operate amongst the EU Member States given that there is no implicit “disconnection clause” in the treaty and, generally, no conflict between the ECT and EU law. (44) In the event that the preliminary reference is sought and the CJEU subsequently endorses the position of the Commission, the EU and the Member States would have to explore options to terminate their obligations under the ECT to the extent that they apply inter se. For instance, the EU and the Member States could provide a written notification for a partial withdrawal from the ECT with respect to each other while maintaining their obligations under the ECT vis-à-vis third countries. Alternatively, they could choose to withdraw from the ECT entirely, as Italy did in 2016. However, in this case, the existing investments would nevertheless continue to receive protection for an additional period of 20 years after the withdrawal, by virtue of Art. 47(3) ECT. As a result, the EU and the Member States would have to tread carefully.

3. The Bigger Picture: Equality or Disadvantage?

One of the main concerns that Achmea presents in relation to third countries is discrimination based on nationality and the destination of the investment. The insistence of the Commission and the CJEU for removing ISDS in the intra-EU context means that investors of an EU Member State choosing to invest in another EU Member State would receive less protection than an investor from the third country investing in that same EU Member State. At present, there is no alternative system in place within the EU that can grant effectively the same investment protection and, therefore, because of Achmea, all European investors lost a significant benefit without gaining anything in particular.

EU Member States are still accountable to investors from third countries, which means that even though a German investor cannot raise a claim against Romania, an Indian investor can nevertheless initiate ICSID proceedings against Romania. Furthermore, with respect to enforcement, national courts within the EU are bound to recognize and enforce awards rendered under extra-EU BITs. This means that a German court would have to recognize the award rendered under the India-Romania BIT but not the one rendered under the Germany-Romania BIT despite the fact that the ISDS system itself is viewed to be incompatible with EU law. This places the German investor at a disadvantage vis-à-vis the Indian investor and in the long run, this could significantly affect the flow of capital into and within the EU. Also, politically, it is difficult to explain why the EU places its own investors in more disadvantageous position than foreign non-EU investors.

V. Achmea Provides a Boost to Respondent EU Member States and the
Commission in Pending Arbitrations

Prior to Achmea, all investment tribunals adopted the same position: they rejected any submissions made by EU Member States and the Commission claiming that ISDS clauses in intra-EU BITs, or the ECT, are in conflict with EU law. (45) In the absence of any authoritative direction by the CJEU, past tribunals followed ad hoc approaches to analyse the relationship between the investment treaties and EU law. For instance, they have: (i) endorsed a harmonious interpretation; (46) (ii) accorded primacy to international law over EU law (47) or (iii) concluded that no conflict exists between the two. (48) No matter the approach followed, the outcome was predominantly the same.

Against this background, the Achmea judgment has come as a shot in the arm for Respondent EU Member States and the Commission. Emboldened by the CJEU’s affirmation of their jurisdictional objections, EU Member States have started raising the so-called “Achmea Objection” in pending arbitrations. In March 2018, Spain requested the tribunal in Masdar v. Spain to reopen the arbitration proceedings so that it could introduce the Achmea judgment into the record. (49) This was followed by a jurisdictional objection by Germany in April 2018 before the tribunal in Vattenfall v. Germany. Germany sought a dismissal of all claims on the ground that the tribunal lacked jurisdiction under the ECT. (50) Both tribunals rejected their applications, (51) thus following the long line of pre-Achmea decisions in this regard.

Despite the tenacity of the Masdar and Vattenfall tribunals, this approach might not prove to be sustainable over time, especially for tribunals seated within the EU. Even though investment tribunals are not bound by the decisions of the CJEU, they would certainly have to factor in the enforceability of their awards. As things stand, proceeding with a finding of jurisdiction under an intra-EU BIT, and possibly the ECT, would render their awards potentially unenforceable within the entire EU. (52) Therefore, tribunals seated in the EU might feel compelled to factor in the jurisdictions where enforcement of the award may be sought and allow themselves to be guided by pragmatism rather than legal doctrine. In any event, CJEU (first instance General Court) will soon shed light on the issue of the enforceability of an ICSID award issued on the basis of an intra-EU BIT within the EU. (53)

The Vattenfall tribunal also addressed the issue of enforcement, albeit briefly. It found that although it is aware of its duty to render an enforceable award, it is “equally conscious of its duty to perform the mandate granted under the ECT.” (54) Although it might be early to predict definitely whether other tribunals will echo this understanding, past tribunals have been quite sceptical regarding the submissions of the EU and its Member States. Given the high stature of the Vattenfall arbitrators and their rigorous analysis of EU law, it is quite likely that other tribunals will feel confident in following its lead. The Vattenfall tribunal may have been one of the first tribunals to pick this road but contemporary trends suggest that it will not be the last to do so.

That being said, the impact of Achmea is bound to be far less pronounced for tribunals seated outside the EU, especially those conducting proceedings under the ICSID Rules. For such tribunals, annulment of their awards based on Achmea by national courts of the seat is highly unlikely since EU law does not bind those courts in any way. Furthermore, enforcement of ICSID as well as non-ICSID awards outside the EU remains unaffected by the Achmea decision and consequently, we may witness a shift in enforcement proceedings outside the EU, especially in the US. A petition for enforcement of the Masdar award rendered post-Achmea was filed in the US District Court for the District of Columbia in late September 2018 and it is expected that other awards will soon follow.

VI. Ramifications for the Proposals to Establish a Permanent Investment Court

In recent years, public discontent with the current framework of Investor-State Dispute Settlement (ISDS) has increasingly intensified within the EU. Consequently, the European Commission has been making concerted attempts in negotiations with third countries for the replacement of the arbitration model with a permanent Investment Court System (ICS). For starters, the ICS has already been incorporated within the Comprehensive Economic and Trade Agreement with Canada, the EU-Vietnam FTA, EU-Singapore FTA (through an additional agreement) and the updated EU-Mexico FTA.

However, the Commission also harbours a broader vision. (55) It envisages the permanent investment court as a “multilateral institution”, one that functions like an international court to decide investment disputes between private investors and all those States that accept its jurisdiction over their BITs. (56) Admittedly, the proposal for the so-called “Multilateral Investment Court” (MIC) is relatively nascent and the structure of this institution remains largely under discussion. (57) However, the decision of the CJEU in Achmea could spur significant changes in the future design of the ICS/MIC if the Commission continues to pursue this initiative.

In Achmea, the CJEU specifically confirmed again that the establishment of a court with the authority to take decisions binding on the EU institutions, including the CJEU itself, is “not in principle incompatible with EU law.” The Court also indicated that two conditions must be satisfied: one, the EU must be a party to the international agreement establishing such a court; and two, the autonomy of the EU and its legal order must be respected in the
In relation to the ICS/MIC proposal, the first condition would be easily satisfied since the European Council has authorized the Commission to negotiate an international convention on behalf of the EU. (59) However, the second condition would prove to be far more challenging.

The principle of autonomy of the EU legal order requires Member States to submit disputes involving interpretation or application of EU law solely to a “court or tribunal” within the EU legal system. Further, the decisions of a judicial institution regarding EU law must be subject to “mechanisms capable of ensuring the full effectiveness of the rules of the EU”, (60) that is, the CJEU. (61) Thus, the CJEU’s stance in Achmea leaves no room for doubt that the EU courts possess an “interpretive monopoly” over questions of EU law. This implies that the MIC can interpret and apply EU law in investor-State disputes only if it is integrated within the EU judicial system in some form, at least formally, while preserving recourse to the CJEU. However, this requirement could jeopardize the entire initiative. Beyond the practical difficulties associated with such integration, creating hierarchical linkages between the MIC and the CJEU would considerably compromise the former’s perception as an independent court on the international plane. Therefore, any attempts to do so will make it increasingly difficult for the Commission to rally international support through the UNCITRAL negotiations.

Notably, concerns regarding the compatibility of the MIC with the autonomy of the EU legal order surfaced long before the Achmea decision. (62) Therefore, the Commission introduced certain “autonomy safeguards” while drafting the provisions for the ICS in CETA. In particular, Art. 8.31 CETA provides five main autonomy safeguards:

(i) the ICS tribunal shall apply only the provisions of the CETA, as interpreted in accordance with the Vienna Convention on the Law of Treaties and principles of international law;

(ii) it has no authority to decide the legality of a measure under the domestic law of a State;

(iii) to assess whether a measure is consistent with CETA, the tribunal may consider the domestic law of a State but only as a matter of fact;

(iv) in this process, the tribunal is bound to follow the prevailing interpretation given to domestic law by domestic courts and authorities of that State;

(v) any meaning given to domestic law by the tribunal would not be binding on the domestic courts and authorities of that State.

In the hearing, the Commission emphasized that the ICS Tribunal would not interpret or apply EU law since it is only permitted to address EU law as a matter of fact, which preserves the autonomy of the EU legal order. (63) In addition, it stressed that EU and the Member States would be bound only by the decision on liability and damages, and not by any meaning ascribed to domestic law by the ICS Tribunal. (64)

However, in light of Art. 8.28 CETA, the Commission’s arguments appear unconvincing. Art. 8.28 allows the Appellate Tribunal to review decisions of the first instance ICS Tribunal also in cases of “manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law”. Obviously, EU law is part of the domestic law of the Member States, which means that the Appellate Tribunal is in a position to interpret and apply EU law as a matter of fact. It is equally obvious that the Appellate Tribunal – being an international tribunal – does not qualify as a domestic court of a Member States and thus is unable to request preliminary rulings from the CJEU. Consequently, the CJEU is – as is the case with arbitral tribunals established under BITs – unable to ensure the consistency and uniformity of EU law. Therefore, it seems likely that the CJEU will consider the ICS/MIC to be incompatible with EU law.

If that is indeed the case, it would become virtually impossible for the Commission to negotiate investment protection agreements with third States that include ICS/MIC provisions. The only remaining forum for investment disputes would thus be domestic courts of EU Member States – an option that third States might not be willing to accept.

VII. Achmea Strengthens ICSID Arbitration as Annulment and Enforcement of Non–ICSID Awards Presents Higher Risks within the EU

In its latest Communication titled “Protection of Intra-EU Investment”, the Commission highlights that post-Achmea, any arbitral tribunal constituted under an ISDS clause of an intra-EU BIT lacks jurisdiction due to the invalidity of the underlying arbitration agreement. (65) It further states: “As a consequence, national courts are under an obligation
to annul any arbitral award rendered on that basis and to refuse to enforce it." (66) This casts a dark cloud over all those enforcement proceedings that involve investor-State awards rendered under intra-EU BITs and are currently pending (or soon to be initiated) before national courts in the EU.

Art. V of the New York Convention allows a national court to refuse enforcement of a foreign arbitral award on one or more of the listed seven grounds, including invalidity of the arbitration agreement and violation of public policy. The national court's discretion to refuse enforcement is triggered only when a party seeks to enforce the award in that State, which is the normal course for commercial arbitral awards as well as investor-State awards.

Under most BITs, foreign investors as claimants can choose between different arbitral institutions and rules such as the ICSID, ICC or SCC. However, unlike other arbitral rules, the ICSID Convention presents a separate, self-contained and autonomous regime for investor-State awards. Awards rendered under the ICSID Rules are subject only to the limited post-award remedies provided for in the ICSID Convention itself, including annulment. (67) Further, under Art. 54 of the ICSID Convention, every State party has the obligation to recognize the award as binding and enforce it "as if it were a final judgment of a court in that State". Thus, ICSID awards are automatically enforceable in all of its 162 contracting States, including EU Member States, without any form of review or interference by domestic courts. On the other hand, non-ICSID awards fall under the general regime of the New York Convention and national arbitration statutes, which means that they are not immune to the effects of the Achmea decision.

It is true that ICSID awards present a significant advantage over non-ICSID awards with respect to enforcement, at least legally. In reality, the European Commission presents a formidable obstacle even to enforcement of ICSID awards, as we have witnessed in the "Micula Saga". The Micula Saga concerns an ICSID award rendered against Romania in 2013 under the Sweden-Romania BIT. In 2015, the European Commission directed Romania not to pay the award on the ground that such payment would constitute illegal state aid under EU law. (68) In response, the Micula brothers initiated enforcement and attachment proceedings in the US, France, Belgium, Luxembourg and Sweden, which have not yielded any recovery so far. (69) In parallel, the Miculas have challenged the decision of the Commission before the CJEU, which is still pending. (70)

The Micula Saga reveals a contentious relationship between EU law and the obligation to enforce awards under Art. 53 of the ICSID Convention, and the European Commission has made its stance clear. In doing so, it has sparked a potential stalemate for EU Member States who are bound by obligations under the EU Treaties as well as public international law, and with no way out for foreign investors except to approach domestic courts within the EU or seek enforcement of their awards outside the EU.

### VIII. Achmea’s Limited Impact on Commercial Arbitration

Achmea has undoubtedly created waves across the realm of international arbitration as a whole, drawing attention from all quarters including of those involved in commercial arbitration who are now wondering: does Achmea affect the future of commercial arbitration?

The judgment was rendered in an investor-State context but the CJEU expressly distinguished between commercial arbitration and investor-State arbitration. The Court held that arbitration proceedings initiated under clauses "such as those referred to in Article 8 of the BIT" are different from commercial arbitration proceedings since EU Member States, not private parties, had agreed to remove disputes "which may concern the application or interpretation" of EU law from their own domestic courts and the EU legal system. (71)

Some commentators have defended this reasoning of the CJEU. They argue that unlike private parties to a commercial contract, Member States have a legal obligation to ensure the full effectiveness of EU law and preserve the autonomy of the EU legal order. (72) While this is correct, the negative aspect of this legal obligation would require Member States to prevent any judicial body outside the EU legal system to decide questions involving the interpretation or application of EU law, including commercial arbitration tribunals. EU law is characterized by an inherent duality: it forms a part of general international law since it is grounded in international treaties, and at the same time, it is subsumed in the domestic laws of the EU Member States through provisions that have direct effect. Thus, it is quite likely that certain disputes submitted to commercial arbitration tribunals would relate to the interpretation or application of EU law, especially where the governing law of the contract is the law of an EU Member State.

The reasoning of Achmea suggests that the CJEU did not take this factor into account. It was quite satisfied with the limited review of commercial awards as long as fundamental provisions of EU law could be examined in that review and recourse to the CJEU via preliminary reference was possible. (73) However, the Court's reasons for denying the same standard for investor-State awards under intra-EU BITs are unpersuasive. If the fundamental provisions of EU law can be effectively safeguarded via the public policy
exception during annulment or enforcement proceedings, one fails to see why the same is not sufficient for investor-State awards.

Since Achmea raises more questions than it answers, it is quite likely that the CJEU will revisit these lingering issues in the future. At the moment, the commercial arbitration regime has nothing to worry about – at least for now.

IX. Achmea’s Potential Impact on Restructuring of Investments

Practitioners have expressed deep concerns that the Achmea decision might have an adverse impact on investor confidence, both in terms of structuring any present or future investment and choosing an arbitral seat within the EU. (74) Consequently, it has been recommended that investors should consider restructuring their investments by creating intermediary subsidiaries in jurisdictions outside the EU such as Switzerland or post-Brexit UK. (75)

From the investor’s perspective, restructuring an investment for the sole purpose of gaining access to investment treaty protection would make sense primarily for sophisticated investors with a sufficiently large corporate structure. This process would require an adjustment of the entire corporate structure since the subsidiary would have to perform legitimate business activities to qualify as an “investor” under most investment treaties. Furthermore, investors would have to consider the timing of the restructuring should they choose to do so. Investors must be careful to restructure their investments before a dispute becomes even foreseeable. If an investor-State tribunal finds that the restructuring was conducted only to gain access to investment treaty protection for a dispute that was foreseeable, it might refuse to exercise jurisdiction on the ground of bad faith or an abuse of rights. (76)

Indeed, the new finalized Dutch model BIT text, (77) which was published in October 2018 explicitly addresses the issue in Art. 16 which states:

“3. The Tribunal shall decline jurisdiction if an investor within the meaning of Article 1(b) of this Agreement, which has changed its corporate structure with a main purpose to gain the protection of this Agreement at a point in time where a dispute had arisen or was foreseeable. This particularly includes situations where an investor has changed its corporate structure with a main purpose to submit a claim to its original home state [emphasis added].”

Thus, the restructuring must be legitimate and independent of the investment treaty dispute itself to eliminate any risks in the actual proceedings. Given the current unpredictability of investment protection within the EU, it is likely that multinational companies with business activities in several jurisdictions would find it worth the time and costs involved to restructure their investments through a subsidiary outside the EU.

At the macroeconomic level, if a trend of restructuring and rerouting of investments were to follow Achmea, it could have the effect of hurting precisely what the Commission and the CJEU seek to protect: the EU common market. The Swiss Arbitration Association Board, which comprises of experienced arbitration practitioners, has already cautioned against a “potential flight of capital” to third countries that the investors may perceive as a safer destination for their investments. (78)

The jury is still out on whether and how foreign investors decide to respond to Achmea. The fact remains that in the absence of a coherent EU investment policy Achmea has become a source of legal uncertainty for all stakeholders involved, especially foreign investors. They are bound to react sooner rather than later to ensure their investments are protected against arbitrary State interference.

X. Achmea Makes EU Investment Protection Regulation Necessary

As discussed above, if the intra-EU BITs are indeed terminated or all ISDS provisions contained therein declared incompatible with EU law, post-Achmea, European investors would have to resort to domestic courts of the EU Member States in order to seek investment protection. However, given the inefficiency and unreliability of the judicial systems in many Member States, it is obvious that those judicial systems need to be significantly improved. It is equally obvious that the Member States concerned are either unable or unwilling to take the necessary steps. Consequently, it falls into the responsibility of the European institutions, in particular the European Commission as guardian of the EU Treaties, to make sure that the domestic judicial systems in all EU Member States are actually able to provide effective and efficient judicial protection to European investors. One way to do that is the adoption of an EU Regulation on Investment Protection that would incorporate the substantive and procedural standards in existing intra-EU BITs. This Investment Protection Regulation should contain the substantive protection standards such as FET, MFN, NT, umbrella, full compensation for (in)direct expropriation etc. In particular, the FET standard should explicitly cover lack of independence and impartiality of the judicial organs, corruption and other shortcomings of the governmental bodies.

Regarding the procedural standards, European investors should have direct access to the CJEU to bring a claim against an EU Member State. For that specialized investment
protection chambers, which are composed not only of judges but also of investment law practitioners, should be established. Appeals on points of law to the CJEU should be possible. In that way, the CJEU would be able to develop and control the specific area of “European investment law”, while European investors would be able to avoid potentially biased and inefficient domestic courts. The advantages of such a Regulation are obvious. First, it would be directly applicable in all EU Member States without any further implementing measures needed and the Regulation would enjoy supremacy over all domestic law of the EU Member States. Second, the Regulation would make the same substantive and procedural standards mandatory in all EU Member States. Third, European investors could directly rely on the Regulation before the CJEU. Obviously, such a solution requires a bit of flexibility and out of the box thinking by leaving the usual preliminary ruling framework behind. (79) However, legally speaking it should be feasible.

XI. The Potential Impact of Achmea for Accession Candidate Countries

Finally, the Achmea judgment may even have an impact on the current accession candidate countries (Albania, Macedonia, Montenegro, Serbia and Turkey) and their BITs with the EU Member States. After all, they are required to bring their entire domestic law, including their international agreements, in line with EU law when acceding to the EU.

Consequently, these candidate countries have to make sure that their BITs are only applicable to the extent they are compatible with EU law. A good example on how to achieve that is the Austria-Croatia BIT from 1999, which states: “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.” In this way, the supremacy of EU law would be ensured. This could probably be done by adopting a joint interpretative note or attaching a protocol to the BITs. Accordingly, these BITs would arguably be complying with the Achmea judgment and all other future judgments of the CJEU.

However, the European Commission might very well demand more from the candidate countries, namely, the termination of all the BITs with the current EU Member States in order to eliminate any intra-EU BIT arbitrations under those BITs. In any event, this shows that the impact of the Achmea judgment could even affect candidate accession countries and their BITs.

XII. Conclusion

The implications of the Achmea judgment are potentially far-reaching and affect the status quo for the arbitration community in more ways than one. There is no denying that Achmea has cast a cloud over the landscape of investment arbitration at least in Europe. That being said, the true extent of the implications will only become clear in the coming years, mainly through the upcoming judgments and Opinions of the CJEU and the decisions of the various international tribunals. In addition, the future course of action adopted by the European institutions and the Member States as well as the attitude of the NGOs, academics, arbitration community and the media will further shape the European investment policy.

References

1) Slawische Republik v. Achmea BV, CJEU Grand Chamber 6.3.2018, Case C-284/16.
2) However, it should be noted that the CJEU already ruled on the (in)compatibility of extra-EU BITs with EU law on several occasions. In a set of cases involving the BITs of Austria, Sweden and Finland, the CJEU decided that these are incompatible with EU law because they do not contain an exception for freezing financial assets in the context of UN and/or EU sanctions. See Commission v. Austria, Case C-205/06, 2009 E. C. R. I-1301; Commission v. Sweden, Case C-249/06, 2009 E. C. R. I-1335; Commission v. Finland, Case C-118/07, 2009 E. C. R. I-10839. See Lavanos, Case-note on BITs judgments, AJIL 2009, 716-722. In another case involving the BIT between the Czech Republic and Switzerland, the CJEU determined that the exclusive rights granted to a Swiss energy company, while violating EU law, must still be honoured due to the BIT, see Commission v. Slovakia, CJEU, Case C-264/09 2011 E.C.R. I-8065.
5) Opinion 2/15, paras. 238 and 292.
7) After the breakup of Czechoslovakia, Slovakia and the Czech Republic became the successors to this BIT.

2. Steht Art. 267 AEUV der Anwendung einer solchen Regelung entgegen? Falls die Fragen 1 und 2 zu verneinen sind:

3. Steht Art. 18 Abs. 1 AEUV unter den in Frage 1 beschriebenen Umständen der Anwendung einer solchen Regelung entgegen?”. The decision is available at http://Juris.bundesanzeiger.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2016&S=... 
11) Achmea, para. 49. For a detailed analysis, see the special focus section on Achmea in the European Investment Law and Arbitration Review 2018 (forthcoming).
13) Art. 8(6) of the Netherlands-Czechoslovakia BIT reads as follows: “The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:

the law in force of the Contracting Party concerned;

the provisions of this Agreement, and other relevant Agreements between the Contracting Parties;

the provisions of special agreements relating to the investment;

the general principles of international law.”

In contrast, Art. 26(6) of the ECT states: “A tribunal established under paragraph (4) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law.”
16) Achmea, para. 49.
17) Art. 351 TFEU reads as follows: “Article 351 (ex Article 307 TEC)
The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.

To the extent that such agreements are not compatible with the Treaties, the Member States or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.”
19) The letter in Dutch is available at https://www.rijksoverheid.nl/documenten/kamerstukken/2018/04/26/kamerbrief-over-investeringsakkoorde....
27) See the various reports assessing the progress under the Cooperation and Verification Mechanism, with judicial reform, the fight against corruption and the fight against organised crime concerning Bulgaria and Romania, available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/assita.
32) See the Commission’s Negotiating Mandate for the FTA with Australia (which is similar to the one with New Zealand), available at http://ec.europa.eu/transparency/regexp/doc/rep/1/2017/EN/COM-2017-472-F1-EN-ANNEX-1-PART-1-PDF.
33) Officially Belgium submitted the following question to the CJEU: “Is Chapter Eight (‘Investments’), Section F (‘Resolution of investment disputes between investors and states’) of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, signed in Brussels on 30 October 2016, compatible with the Treaties, including with fundamental rights?” (OJEU C 369/2, 30.10.2017). However, reportedly Belgium has raised the following more specific questions: the exclusive competence of the CJEU to provide the definitive interpretation of European Union law; the general principle of equality and the “practical effect” requirement of European Union law; the right of access to the courts; the right to an independent and impartial judiciary; the right to an independent and impartial judiciary, the CJEU is asked to give consideration to certain specific elements including: the conditions regarding the remuneration of the members of the Tribunal and the Appeals Body; the appointment of members of the Tribunal and the Appeals Body; the release of members of the Tribunal and the Appeals Body; the guidelines of the International Bar Association regarding conflicts of interest in international arbitration and the introduction of a code of conduct for the members of the Tribunal and the Appeals Body; the external professional activities related to investment disputes of members of the Tribunal and the Appeals Body. See https://hsfnotes.com/仲裁/2017/09/12/belgium-asks-for-the-cjeu-opinion-on-the-compatibility.....
34) The Opinion of the AG Bot regarding Opinion 1/17 was scheduled to be delivered on 23.10.2018 but has been postponed to an unknown date at the time of writing.
37) CJEU Opinion 2/15, para. 293.
39) CJEU Achmea, para. 57.
44) Vattenfall AB and others v. Federal Republic of Germany, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, para. 206.
45) This position was recently reaffirmed in two cases: Masdar Solar & Wind Cooperatief v. Kingdom of Spain, ICSID Case No. ARB/14/1 (Award) and Vattenfall v. Germany, para. 1.
46) RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux v. Kingdom of Spain, ICSID Case No. ARB/13/30 (Decision on Jurisdiction).
47) RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux v. Kingdom of Spain, ICSID Case No. ARB/13/30 (Decision on Jurisdiction).
49) Masdar v. Spain, para. 669.
50) Vattenfall v. Germany, para. 1.
54) Vattenfall v. Germany, para. 230.
55) See Art. 8.29 CETA and Art. 8.15 EU-Vietnam FTA for instances of multilateralization of investment protection in EU’s Trade agreements.
58) CJEU Achmea, para. 57.
60) CJEU Achmea, para. 43.
67) Art. 53 of the ICSID Convention.
71) CJEU Achmea, para. 55.
73) CJEU Achmea, para. 54.

79) See also the various proposals contained in the 2016 Non-paper from Austria, Finland, France, Germany and the Netherlands on intra-EU Investment Treaties, available at https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/publicaties/2016/05/18/non-paper-inve....