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The Status of International Investment Agreements Between EU Member States and Non-EU States:

Implications of Developments in EU Law

30 August 2020, Jerusalem

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Beneficiary: The Ministry of Justice, The Ministry of Finance, The Ministry of Economy and Industry, and the Ministry of Foreign Affairs, Government of Israel.

The contents of this memorandum are solely the views of the authors. It was prepared without the active involvement of the beneficiary and does not necessarily reflect its views or positions.

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Abbreviations

BIT- Bilateral Investment Treaty

CCP- Common Commercial Policy

CETA- European Union-Canada Comprehensive Economic and Trade Agreement

CJEU- Court of Justice of the European Union

ECJ- European Court of Justice

ECT- Energy Charter Treaty

EEC- European Economic Community, Treaty of Rome

EP- European Parliament

EU- European Union

EUSFTA- European Union-Singapore Free Trade Agreement

FDI- Foreign Direct Investment

FTA- Free Trade Agreement

GDP- Gross Domestic Product

HKIA- Hong Kong International Arbitration Centre

ICC- International Chamber of Commerce

ICJ- International Court of Justice

ICSID- International Centre for Settlement of Investment Disputes

IIA- International Investment Agreement

ISDS- Investor-State Dispute Settlement

LCIA- London Court of International Arbitration

MIC- Multilateral Investment Court

MIT- Multilateral Investment Treaty

MS- Member State

NAFTA- North American Free Trade Agreement

NGO- Non-Governmental Organization

SCC- Stockholm Chamber of Commerce

TEU- Treaty on European Union

TFEU- Treaty on the Functioning of the European Union

UNCITRAL- The United Nations Commission on International Trade Law

UK- United Kingdom

VCLT- Vienna Convention on the Law of Treaties

WTO- World Trade Organization

Executive Summary

Following recent developments in EU law concerning the validity of international investment agreements (IIAs) between the EU Member States, and primarily following the Court of Justice of the European Union's (CJEU) recent ruling in the *Slovak Republic v. Achmea* case, there is a need for clarity regarding the status of IIAs between EU Member States and non-EU Member States.

In the 2018 *Achmea* ruling, the CJEU ruled that all intra-EU agreements with dispute settlement by arbitration conflict with Art. 344 TFEU, and therefore infringe on the autonomy of EU law and should be terminated. The CJEU revisited the subject the 2019 Opinion 1/17, concerning the Comprehensive and Economic Trade Agreement between Canada and the EU (CETA). The court concluded that contrary to the *Achmea* ruling, the arbitration mechanism in CETA does not raise the same issues of incompatibility with EU law. Specifically, the Court was certain that arbitration under CETA does not conflict with the autonomy of EU law as stated in the *Achmea* ruling.

The EU Commission and most EU Member States recently signed the Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union (May 5th, 2020), in which they agreed upon the formal termination of all intra-EU investment agreements. While the agreement does not explicitly refer to extra-EU agreements, the question of whether these developments in CJEU jurisprudence might affect extra-EU agreements must be considered. At first glance, it seems that there will be no effect in an extra-EU context, partially because the *Achmea* decision and the 2020 Termination Agreement specifically only mention intra-EU agreements. However, several issues raise the possibility that these recent developments could in fact have at least an indirect impact on extra-EU agreements as well. For instance:

1. The vague wording used in *Achmea* may allow for a wider application of the ruling;
2. The frequent jurisdictional objections raised by the EU and its Member States express the EU's disapproval of the application of EU law by arbitral tribunals;
3. A non-binding communication previously issued by the EU regarding the decision's applicability to the ECT hints at the EU's concerns in areas that are not purely intra-EU.

As *Achmea* and the subsequent developments in EU law may have at least some indirect effects on extra-EU IIAs, there is a rising need to map some of the possible implications. The possible implications on extra-EU agreements resulting from the current legal uncertainty may include:

1. Challenges in future negotiations of extra-EU agreements that include an arbitration clause;
2. An increase in the frequency of jurisdictional objections raised by EU Member States that are a respondent to a claim settled by investment arbitration;
3. Issues of enforceability of arbitral tribunal awards against EU Member States.

If *Achmea* and the 2020 Termination Agreement are formally applied to extra-EU IIAs, the potential implications may include:

1. The absence of investment protection for EU investors in third countries;
2. A difference in bargaining power between the EU and third countries attempting to negotiate new or existing investment agreements;
3. Possible effects on multilateral investment treaties such as the ECT.

With the above potential implications and effect in mind, we offer mechanisms third countries may utilize to provide better protection for their investors. Some of these include:

1. Careful wording of the applicable law clause in order to limit the applicability of EU law;
2. Use of joint interpretive instruments, intended to bind tribunals considering a dispute to specific interpretations agreed upon by the contracting parties;
3. The benefits of seating arbitral tribunals outside of the EU legal system, in order to distance disputes from the influence of EU institutions and EU Member State Courts;
4. Utilizing sunset provisions;
5. Negotiate IIAs with the EU, as opposed to negotiations with individual Member States, in an attempt to provide the agreement with higher legitimacy in terms of EU law.

In conclusion, while the implications of recent developments in CJEU jurisprudence on extra-EU agreements may be unclear, there are several steps which third countries may consider in order to better protect their investors from the potential implications of recent developments in EU law. While none of the above suggestions provide a full solution, they may be able to provide additional certainty and of protection to investors investing under extra-EU IIAs.

1 Introduction

Recent rulings by the Court of Justice of the European Union ("CJEU") have established several conditions under which international investment agreements ("IIAs") may be precluded under EU law.[1] Although these rulings do not mention the status of extra-EU IIAs, it is possible to argue, on the basis of their rationale, that extra-EU IIAs might be precluded, or at the very least unenforceable, under EU law. This has created uncertainty amongst EU Member States and third countries alike, as well as for third country investors currently invested or investing in the EU, regarding possible ramifications to extra-EU IIAs.[2] In other words, the concern that arises is that despite long standing IIAs between EU member states and third countries, legal and judicial developments within the EU over the last few years may result in a significant impairment of third country investor rights in the EU. This Memorandum provides an analysis of the implications of these developments on extra-EU IIAs and the protection of investments included in their scope.

IIAs are treaties between two or more states that aim to encourage and facilitate transnational investment flows,[3] which are subject to the principles and standards of public international law.[4] Many IIAs include arbitration provisions that allow foreign investors to initiate arbitral proceedings directly against host states under international arbitration rules such as ICSID and UNCITRAL, for violations of IIA provisions by the host state.[5] Arbitral tribunals convened on this basis may award compensation,[6] and the tribunal's decision is largely not subject to appeal,[7]

[1] CJEU, Opinion 2/15 of 1of 16 May 2017, ECLI:EU:C:2017:376, paragraph 225-245, [hereinafter: *Opinion 2/15*]; CJEU, Opinion 1/17 of 13 October 2017, ;ECLI:EU:C:2019:341, [hereinafter: *Opinion 1/17*].

[2] Szilárd Gáspár Szilágyi & Maxim Usynin, *The Uneasy Relationship between Intra-Eu Investment Tribunals and the Court of Justice's Achmea Judgment*, SSRN ELECTRONIC JOURNAL (2019) [hereinafter: T*he Uneasy Relationship between Intra-Eu Investment Tribunals and the Court of Justice's Achmea Judgment*].

[3] Ignacio Gómez-Palacio & Peter Muchlinski, *Admission and Establishment*, OXFORD HANDBOOKS ONLINE 5–6 (2008).

[4] Gleider I. Hernández, *The interaction between investment law and the law of armed conflict in the interpretation of full protection and security clauses*, INVESTMENT LAW WITHIN INTERNATIONAL LAW 21–50 (2013).

[5] Benedict Kingsbury & Stephan W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, SSRN ELECTRONIC JOURNAL (2009) [Hereinafter: *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*].

[6] Ibid., 17, 26.

[7] Awards are subject to limited remedies provided in the ICSID convention under specific circumstances. A party may request the full or partial annulment of an award if a gross miscarriage of justice has taken place, such as corruption or failure to follow fundamental procedural rules, at: *Post-Award Remedies - ICSID Convention Arbitration*, POST-

although their enforcement may be subject to separate legal procedures. Generally, arbitral tribunals are established ad hoc, do not apply *stare decisis*, and do not have the authority to promulgate laws.[8]

The global IIA regime currently consists of over 3,500 such treaties. The EU is one of the world's largest sources and recipients of foreign direct investment in the world, with the EU Member States party to roughly half of all IIAs worldwide (approximately 1,400).[9] Some of these are between EU Member States ("intra-EU IIAs"), while many more are between EU Member States or the EU as a whole, and between non-EU Member States ("extra-EU IIA"').

The IIA regime is increasingly criticized for circumventing national legal systems through arbitral tribunals that function as an alternative judicial system that is lacking in transparency and in sensitivity to non-investor interests.[10] Furthermore, IIAs can restrict a state's ability to adopt, change and enforce regulation affecting investors under the agreement, in ways that impact negatively on public policy and the right to regulate.[11]

These concerns have been especially clear in the evolving jurisdictional friction between EU and Member State judiciaries, on the one hand, and arbitral tribunals established under IIAs, on the other hand. While the CJEU is concerned with safeguarding the primacy of EU law, arbitral tribunals enforce state obligations under IIAs, often creating opposing views between the two judicial bodies.[12] As we will show throughout this Memorandum, arbitral tribunals have consistently rejected arguments relating to EU legal jurisdiction and normative supremacy.[13] Investor-State Dispute Settlement ("ISDS") provisions in IIAs have become a focus of debates

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AWARD REMEDIES - ICSID CONVENTION ARBITRATION, https://icsid.worldbank.org/en/Pages/process/Post-Award-Remedies-Convention-Arbitration.aspx (last visited Jun 12, 2020).

[8] Martins Paparinskis, *Investment treaty interpretation and customary investment law: Preliminary remarks*, EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION, 65–96 (2011).

[9] European Commission Directorate-General for Trade, *Investment - Trade - European Commission*, https://ec.europa.eu/trade/policy/accessing-markets/investment/ (last visited Apr 25, 2020).

[10] *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*, *supra* note 5, 2-3, 41.

[11] Jörn Griebel, Manjiao Chi, *Integrating Sustainable Development in International Investment Law*, EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 487–491 (2018).

[12] Dana Burchardt, *The Relationship Between the Law of the European Union and the Law of its Member States - a Norm - Based Conceptual Framework*, 15 EUROPEAN CONSTITUTIONAL LAW REVIEW 73–103 (2019). [hereinafter: *The relationship between the law of the European Union]*

[13] T*he Uneasy Relationship between Intra-Eu Investment Tribunals and the Court of Justice's Achmea Judgment, Supra note 2,* 6-10.

regarding EU law supremacy, and EU law has become a major factor in the reform of the IIA regime. Thus several recent CJEU rulings and developments within the EU have attracted a great deal of attention regarding the legal inadmissibility and unenforceability of intra-EU IIAs in the eyes of the CJEU and Member States, and raised questions about possible implications for extra-EU IIAs.[14]

One far-reaching and well-known decision is the 2018 judgment in *Slovak Republic v. Achmea*, in which the CJEU ruled that the autonomy of EU law and mutual trust between EU member states preclude ISDS mechanisms in intra-EU IIAs.[15] Another significant development was noted by the CJEU in the 2019 Opinion 1/17, in which the CJEU asserted the compatibility of arbitration by a multilateral investment tribunal ("MIT") under the Comprehensive and Economic Trade Agreement ("CETA")[16] between Canada and the EU, for present purposes an extra-EU IIA. In its opinion, the CJEU emphasised the EU Member States' right to self-regulate economic activity in the public interest under CETA,[17] while ruling that any interpretation or application of EU law by the MIT's ISDS mechanism that prevented "EU institutions from operating in accordance with the EU constitutional framework" would be incompatible with EU law autonomy.[18] The *Achmea* decision and Opinion 1/17, combined, reflect the tension between the CJEU and ISDS in both intra-EU and extra-EU IIAs over jurisdiction and normative supremacy.[19]

In this Memorandum, we will provide context and meaning to these developments in EU law with respect to IIAs and their possible application to extra-EU IIAs in practice. Following this introduction, **Chapter 2** will present additional background information on developments in the EU legal system and frame the issues to be explored. In **Chapter 3**, we will analyse whether EU law and jurisprudence *could* affect extra-EU IIAs, in structural legal terms. This will serve as the

[14] Kirstin Schwedt et al., *Intra-EU ECT Claims Post-Achmea: Vattenfall Decision Paves the Way Kluwer Arbitration Blog* (2018), http://arbitrationblog.kluwerarbitration.com/2018/12/13/intra-eu-ect-claims-post-achmea-vattenfall-decision-paves-the-way/. (last visited Jun 12, 2020).
[15] *284/16 Slovak Republic v. Achmea, ECR 158 (2018).* [Hereinafter: *Achmea]*
[16] Canada- European Union: comprehensive Economic and Trade Agreement, entered to force on 21 September 2017, [Hereinafter: CETA].
[17] Id., 154-155.
[18] Id., 119.
[19] Decleve Quentin, *Achmea: Consequences on Applicable Law and ISDS Clauses in Extra-EU BITs and Future EU Trade and Investment Agreements*, EUROPEAN PAPERS 99–108 (2019), http://www.europeanpapers.eu/en/e-journal/achmea-consequences-on-applicable-law-and-isds-clauses-in-extra-eu-bits (last visited Jun 12, 2020) [Hereinafter: *Achmea: Consequences on Applicable Law and ISDS Clauses in Extra-EU BITs and Future EU Trade and Investment Agreements*, European Papers].

backdrop to **Chapter 4**, in which we will discuss how EU legal developments might impact extra-EU IIAs, i.e, the possible implications in substance, including factors that might expose investors from parties to extra-EU IIAs to greater risk in the EU. Finally, **Chapter Five** will build on the Memorandum's findings and suggest ways in which Third Countries that are parties to IIAs with EU Member States can provide better protection for their investors currently investing in the EU under the current legal uncertainty regarding the status of extra-EU IIAs in the EU.

2 Background: International Investment Law and Recent Developments in the European Legal System

2.1 The Engagement of EU Law with International Investment Law Post-Lisbon Treaty

The Lisbon Treaty, signed by the Member States in 2009, is one of the most notable developments of EU integration. Among other things, the Lisbon Treaty clarified the legal abilities of the EU, creating areas of exclusive competence, where the EU alone may legislate, shared competence, allowing EU Member States to legislate if the EU has not done so, and supporting competence, where the EU adopts policies that support member States' policies.[20]

Following the ratification of the Lisbon Treaty, Member States were no longer able to conclude their own bilateral investment treaties ("BITs") unless they received authorization to do so by the EU.[21] EU Regulation 1219/2012 addresses the status under EU law of agreements between EU Member States and third countries that were concluded prior to the entry into force of the Lisbon Treaty, and allows the Member States to amend existing extra-EU IIAs as well as conclude new ones.[22] According to the regulation, in order to enter into negotiations or conclude a BIT with a third country, Member States must obtain authorization from the European Commission.[23] Potential grounds for refusal on the Commission's part, as listed in Art. 9 para. 1 of the regulation, include incompatibilities between the negotiated agreement and EU law, the EU's intention to begin negotiations with the third country concerned, inconsistency with EU principles and objectives, and the concern that the particular negotiations will constitute a serious obstacle to the negotiation of an International Investment Agreement (IIA) with third countries by the EU.[24]

[20] Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13 2007, 2007 O.J (C 306); *The Treaty of Lisbon*, https://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon (last visited Sep 30, 2020).

[21] T*he Uneasy Relationship between Intra-Eu Investment Tribunals and the Court of Justice's Achmea Judgment, Supra note 2,* 6-10.

[22] Regulation 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries. (2012) OJ L351/40. Retrieved from http://eur-lex.europa.eu/eli/reg/2012/1219/oj (http://eurlex.
europa.eu/eli/reg/2012/1219/oj).

[23] Id. Art. 8, para. 1.

[24] Id. Art. 9, para. 1(b-c).

2.2 Opinion 2/15

In October, 2014, the EU and Singapore concluded a Free Trade Agreement with Singapore (EUSFTA), which included an investment chapter, making EUSFTA the first EU IIA.[25] The EU Commission sought the CJEU's opinion on the EU's legitimacy and legal competence to sign an IIA on behalf of EU Member States. On 16 May 2017, the CJEU delivered its ruling in Opinion 2/15.

In its ruling, the CJEU differentiated between the EU's ability to control direct and non-direct foreign investment as included in the investment protection chapter of the EUSFTA.[26] The CJEU ruled that the EU may control direct foreign investment (FDI), as investments constitute a component of the EU's regulatory authority over the EU's internal market, however it may not regulate non-direct foreign investments through the EUSFTA alone.[27] Secondly, the CJEU accepted the EU Commission's argument that the EU has exclusive competence to conclude, terminate and replace existing IIAs between member states and Singapore, based on exclusive authority acquired in the Lisbon Treaty over FDIs.[28] Finally, the CJEU ruled that the EU can create provisions in FTA agreements regarding ISDS only under shared competence with EU Member States.[29] Shared competence is derived from Art. 4 TFEU, and creates a mechanism in which both the EU and Member States are permitted to regulate. However, in the event of a conflict between regulations, EU law prevails, and due to the EU's treaty-making power, Member States cannot pass legislation competing with EU law.[30]

2.3 The Slovak Republic v. Achmea

The CJEU's ruling in the *Slovak Republic v. Achmea BV* case, rendered on 6 March 2018, has been a stepping stone for a series of developments in EU law regarding the compatibility of intra-EU

[25] Rumiana Yotova, *Opinion 2/15 of the CJEU: delineating the scope of the new EU competence in foreign direct investment*, 77 THE CAMBRIDGE Law Journal volume, 29-32, 29 (2018) [hereinafter: *Opinion 2/15 of the CJEU]*
[26] CJEU, Opinion 2/15, *supra* note 1.
[27] Id., paragraph 232-245.
[28] Id., paragraph 246-249,
[29] Id., paragraph 292-293
[30] *Precedence of European law*, EUR-LEX,*available at:* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14548#:~:text=The%20precedence%20principle%20guarantees%20the,the%20European%20Union%20(CJEU).

IIAs. In 2008, *Achmea* launched arbitration proceedings against Slovakia under the 1991 Netherlands-Slovakia BIT, claiming Slovakia has violated substantive treaty provisions. Slovakia, supported by the European Commission, challenged the jurisdiction of the tribunal, arguing that EU Law superseded the BIT following Slovakia's Accession to the EU. The Commission, participating as a non-disputing party, raised various arguments questioning the intra-EU BIT's compatibility with EU law, claiming that the matters regulated by the BIT fall under EU competences, that they discriminate between investors of different Member States, that enforcement of arbitral awards rendered under intra-EU BITs might violate EU State Aid rules, and most importantly for the purpose of this memorandum, the Commission argued that arbitral tribunals might interpret and apply EU law without recourse to judicial review by the CJEU, therefore violating the principle of autonomy of EU law. However, the ad-hoc arbitral tribunal constituted under the UNCITRAL rules upheld its own jurisdiction, and rendered its final award in 2012, concluding that Slovakia had in fact violated the BIT and ordered it to pay approximately EUR 22.1 million of damages to Achmea.[31]

Following the award, Slovakia applied for the arbitral award to be overturned by the German Federal Court of Justice (the Bundesgerichtshof) in 2015. The Court referred questions on the compatibility of the BIT's arbitration clause with EU law to the CJEU for a preliminary ruling. The court focused on whether Art. 344 TFEU precludes the application of an arbitration clause in a pre-accession intra-EU BIT, where the arbitral proceedings were not brought until after accession. The CJEU delivered its ruling on 6 March 2018, concluding that Art. 267 and 344 TFEU in fact preclude the arbitration clause in all intra-EU IIAs.[32] The CJEU's ruling in the *Achmea* case led to the conclusion that all intra-EU IIAs are incompatible with EU law, due to conflicts between the ISDS arbitration clause and the principle of Autonomy of EU law, as well as issues of substantive law between intra-EU IIAs and EU law.[33] Following this decision, the European Commission and its Member States initiated efforts to terminate all intra-EU IIAs.

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31 Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic)

[32] *Achmea*, *supra* note 15.

[33] Cristina Contartese, Achmea and Opinion 1/17: Why do Intra and Extra-EU Bilateral Investment Treaties Impact Differently on the EU Legal Order? , *ECB LEGAL WORKING PAPER, 7-18, 7 (2019) available at:* https://www.ecb.europa.eu/pub/pdf/scplps/ecb.lwp19~e4d0a59cea.en.pdf

2.4 Opinion 1/17

The CJEU once again faced the question of IIA compatibility with EU law in April 2019, ruling on the compatibility between the EU Treaties and fundamental rights and the Canada-EU Comprehensive and Economic Trade Agreement ("CETA"). As the CETA includes an ISDS mechanism, it could seem that the same issues causing incompatibility between intra-EU arbitration and EU principles in *Achmea* would imply the same inconsistency between CETA and the EU Treaties. However, in Opinion 1/17, the CJEU asserted that the dispute settlement mechanism under CETA is barred from interpreting EU law, nor will it provide binding precedence for the CJEU, and is therefore consistent with the EU Treaties.[34] As Art. 8.31. para. 2 of the treaty states that in situations in which the CETA Tribunal will be required to examine and apply EU law, "**the Tribunal will have to confine itself to an examination of EU law *as a matter of fact* and will not be able to engage in interpretation of points of law**" (emphasis added).[35]

2.5 The Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union

On May 5th, 2020, the consequences of *Achmea* were constructed into a binding document, entitled the Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union ("Termination Agreement"). The agreement, signed by 23 Member States (notably, without Austria, Ireland, Sweden, and Finland), confirms the formal and coordinated termination of approximately 130 intra-EU BITs.[36]

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[34] *Id.*

[35] *Opinion 1/17, supra* note 1, para. 75-76.

[36] Agreement for the Termination of intra-EU BITs: *EU Member States sign an agreement for the termination of intra-EU bilateral investment treaties, European Commission website, 5 may 2020,* https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/200505-bilateral-investment-treaties-agreement_en.pdf [hereinafter: *Termination agreement*]; In its preamble, the agreement refers to Art. 70 VCLT's guidelines on the termination of treaties to assure that the agreement "releases the parties from any obligation further to perform" any substantial or procedural obligations under any intra-EU IIAs. The agreement, in its Preamble and in Art. 4 and 5 clarifies the incompatibility of arbitration clauses with EU law and emphasizes that such clauses cannot serve as a basis for arbitration proceedings. Art. 2 and 3 address the effect of sunset clauses contained in existing BITs as well as BITs that have been previously terminated, and state that all such clauses will have no effect following the ratification of the agreement. Art. 7 sets out the "duties" of the signatories in pending or new arbitration proceedings, and requires the respondent Member States to inform the relevant arbitral tribunals in

Although the agreement provides detailed guidelines for the termination of intra-EU IIAs, it does not refer to extra-EU agreements. However, one cannot conclude definitively on this basis, from the Termination Agreement, as an operative extension of the *Achmea* decision regarding intra-EU IIAs, that the logic of *Achmea* will not have an indirect effect on extra-EU IIAs. The Preamble of the agreement explicitly notes that it does not cover intra-EU proceedings under the ECT, but the European Commission reserves the right to extend the scope of the agreement, *mutatis mutandis*, in the future by stating that "The European Union and its Member States will deal with this matter at a later stage". Prior to the signing of the Termination Agreement, in July 2018, the EU Commission issued a non-binding communique, accepted by 21 EU Member States, stating that *Achmea* does in fact apply to intra-EU investor-state arbitrations under the ECT (an annex to this Memorandum will briefly discuss the ECT in context).[37]

2.6 Challenges to CJEU Authority by Arbitral Tribunals and EU Member States

In the absence of a unified course of action or position on extra-EU IIAs, as mentioned above, there are strong underlying currents that may shape the potential impact of *Achmea*, Opinion 2/15 and Opinion 1/17 on extra-EU IIAS.

2.6.1 The Tension Between Arbitral Tribunals and the CJEU

The CJEU is tasked with the application and interpretation of EU law, whereas arbitral tribunals enforce states' obligations under investment treaties, which can put the two at odds. In recent years, there have been many examples - even prior to the *Achmea* ruling - of legal arguments raised against arbitral tribunals' jurisdiction based on EU law and its normative superiority vis-a-vis international law. These arguments have been consistently rejected by arbitral tribunals, and

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those proceedings of the "legal consequences of the Achmea Judgment" as described in Article 4 of the Termination Agreement. The Termination Agreement also sets out two "transitional measures" designed to aid EU Member States involved in pending arbitration proceedings. In Art. 9, the Agreement provides that an investor may ask the Member State to enter into settlement discussions, which shall be overseen by "an impartial facilitator". Any final settlement agreement must include an obligation for the investor to withdraw the arbitration claim or renounce execution of its award, as well as a commitment to refrain from initiating new arbitration proceedings. In Art. 10, the Termination Agreement entitles investors to "access the judicial remedies under national law against a measure contested in Pending Arbitration Proceedings" even if national time limits for bringing such actions have expired. This is, again, on the condition that the investor agrees to withdraw the pending arbitration proceedings and wave all rights and claims pursuant to the relevant BIT.

[37] Sherina Petit, Cara Dowling, and Charlotte Hornby, *Investment Protection Post-Achmea*, NORTON ROSE FULBRIGHT - INTERNATIONAL ARBITRATION REPORT 12, 29-30, 30 (2019) [hereinafter: *international arbitration report*]

consistently accepted by branches of the EU, including the Commission and CJEU.[38] These cases, which dealt with intra-EU IIAs, indicate strongly that both arbitral tribunals and the CJEU are in no rush to accept laws and precedents that would limit their jurisdictional reach or the regulatory space of EU legislative bodies.[39] In the event of conflicting obligations before EU courts and IIAs, EU Member States and investors may need to choose between their commitments to arbitral tribunals' jurisdiction and awards rendered by arbitral tribunals under IIAs, or EU law and its normative superiority.

2.6.2 CJEU Authority and Normative Supremacy of EU Law

It may be necessary to view the string of recent CJEU rulings on IIAs with EU Member States, referred to in the above paragraph, in light of a broader effort to gain and maintain authority over EU member states' domestic legal systems. EU law must delicately balance itself with domestic law, while not upsetting the checks and balances between the systems.[40] The EU legal system views the application of its laws as final and without exception.[41] In addition, the EU Commission has openly discussed the need to exert and solidify the EU's control over its Member States legal systems and the application of EU law.[42] Moreover, the legitimacy of the EU is under serious threat,[43] as some view it as a bureaucratic organization passing laws and making decisions without accountability to EU citizens and without trust and involvement from EU citizens.[44]

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[38] For example, in *Euram v. Slovakia (22.10.12)*, Slovakia, along with the European Commission as an observer, argued that IIAs are superseded by EU law, according to Art. 344 of the TFEU, and that the arbitration provision of the IIA was not applicable for EU members. Slovakia further argued that under international law the IIA was terminated when it acceded to the EU. The arbitral tribunal, however, disagreed with the jurisdictional objection and concluded that it "**does not provide for an absolute monopoly of the CJEU over the interpretation and application of EU law**", *Euram v. Slovakia* 77. In *Eureko B.V. v. The Slovak Republic*, the Slovak Republic objected to the tribunal's jurisdiction based on the claim that the CJEU has the absolute authority to interpret EU law. The arbitral tribunal argued that the CJEU has no such monopoly, as courts throughout the EU interpret and apply EU law.

[39] Kristin Schwedt, Hannes Ingwersen, *Intra-EU ECT Claims Post-Achmea: Vattenfall Decision Paves the Way*, KLUWER ARBITRATION BLOG (2018) , *available at*: http://arbitrationblog.kluwerarbitration.com/2018/12/13/intra-eu-ect-claims-post-achmea-vattenfall-decision-paves-the-way/.

[40] *The relationship between the law of the European*, *supra* note 12, page 75-76, 80.

[41] Id. Page 75-76, 93

[42] Dimitry Kochenov & Laurent Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, 11 EUROPEAN CONSTITUTIONAL LAW REVIEW 512–540, 514-516 (2015).

[43] Vivien A. Schmidt , *The Eurozone's Crisis of Democratic Legitimacy: Can the EU Rebuild Public Trust and Support for European Economic Integration?*, 15 EUROPEAN ECONOMY DISCUSSION PAPER, 10-31, 15, (2015) *available at:* https://ec.europa.eu/info/sites/info/files/dp015_en.pdf.

[44] Miroslava Scholten, *Mind the trend! Enforcement of EU law has been moving to 'Brussels'*, JOURNAL OF EUROPEAN PUBLIC POLICY, 1348-1366, 1354 (2017); J.H.H. Weiler, Van Gend en Loos, *The individual as subject and object*

Domestic courts in EU Member States frequently opt for an approach that balances EU and domestic law primacy and regulatory jurisdiction.[45] As presented in section 2.2, in Opinion 2/15 the CJEU balanced EU and EU Member States economic treaty-making authority by defining areas of shared competence,[46] and areas in which the EU or its Member States have exclusive treaty-making authority.[47] This balancing act often upsets harmonization between the systems and causes tension, with EU and domestic law systems grappling for supremacy.[48] States are more likely to fail to comply with EU law when there is a lack of domestic will or resources,[49] or when other EU Member States simply choose not to comply.[50] This non-compliance has been viewed by the EU Commission as a "rule of law crisis",[51] and a possible systematic threat to undermine EU law on a domestic and intra-EU level.[52] Particularly, it becomes apparent that the CJEU does not show much support for investment agreements between individual states, as these agreements may conflict with EU law.

These developments have led to an increased effort in recent years by the EU Commission and CJEU to enforce their authority on private actors and domestic law in order to ensure its laws and policies are implemented.[53] For example, the Council of the EU has threatened to sanction Member States that violate EU values according to Article 7 TEU.23, or deprive states of their EU Treaties rights, such as the ability to vote.[54] It follows that if the EU cannot regulate legal disputes between its Member States, the already unstable rule of EU law may be further weakened.[55] In order to

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and the dilemma of European legitimacy, 12 *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW*, 94–103,102 (2014) available at: https://doi.org/10.1093/icon/mou011 [hereinafter: *mind the trend!]*

[45] F. Giorgi and N. Triart, *Judges, Community Judges: Invitation to a Journey through the Looking-glass – On the Need for Jurisdictions to Rethink the Inter-systemic Relations beyond the Hierarchical Principle*, 14 ELJ, 693 (2008)

[46] Opinion 2/15, *supra* note 1, para.246-249,

[47] Id., para.292-293

[48] J.H.H. Weiler, Van Gend en Loos: *The Individual as Subject and Object and the Dilemma of European Legitimacy*, 12 *INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW*, 94–103, 96 (2014) *available at:* https://doi.org/10.1093/icon/mou011 page 96; *The Relationship Between the Law of the European Union and the Law of its Member States*, *supra* note 12 ,Page 77, 87.

[49] Tanja A. Börzel et al., *Obstinate and Inefficient: Why Member States Do Not Comply With European Law*, 43 COMPARATIVE POLITICAL STUDIES , 1363–1390, 1367-1370 (2010).

[50] *Mind the trend*, *supra* note 43 , page 1353.

[51] Dimitry Kochenov & Laurent Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, 11 European Constitutional Law Review 512–540, 514 (2015) [hereinafter: *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality]*

[52] Mind the trend, *supra note 43*, page 1354.

[53] Id., page 1352.

[54] *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, *supra* note 52, page 516.

[55] Id., page 514.

prevent this , it appears that the CJEU has a policy interest in obtaining and maintaining normative superiority over EU Member States' IIAs in both intra-EU as well as extra-EU context. In light of this, the future of extra-EU IIAs is cast in doubt.

2.7 Potential Implications of Recent Developments in EU Law on Extra-EU IIAs

Following the *Achmea* ruling, in which the CJEU raised substantial concerns regarding the validity of arbitration clauses in disputes in which any element of EU law may be of relevance, one may wonder what the extent of these concerns is, and whether they may also apply in the context of extra-EU disputes. While the CJEU avoided this conclusion in Opinion 1/17, some elements of the CETA agreement providing the basis for the CJEU's conclusion that the CETA tribunal raises no issues of incompatibility with EU law, may not be found in most typical Member State extra-EU BITs, as they normally call for settlement of disputes by ad-hoc ISDS tribunals rather than a permanent multi-level investment court system. Additionally, the recent Termination Agreement seems to further reduce the likelihood of any such implications on extra-EU agreements, as it provides no reference to extra-EU IIAs whatsoever. However, the Termination Agreement expressly reserves its right to deal with certain aspects "at a later stage".[56] In light of the above, a valid question may be whether the recent developments in EU law mentioned in this chapter could potentially have some implications on extra-EU IIAs as well.

[56] *Termination Agreement,* p.6.

3 Can Developments in CJEU Jurisprudence Affect EU Member State's Extra-EU International Investment Agreements?

While *Achmea* deals primarily with intra-EU IIAs and ISDS thereunder, and Opinion 1/17 deals with the evolving contours of ISDS under IIAs between the EU and third-countries, when taken in conjunction with each other, they may raise questions about the status of extra-EU IIAs and their ISDS mechanisms. This uncertainty regarding the future of extra-EU IIAs has created unease amongst EU Member States and third countries alike, as well as among foreign investors. In order to engage with these questions, this chapter will first analyse whether, and under which circumstances, the rationales of the *Achmea* ruling and Opinion 1/17 could apply to extra-EU IIAs. In the subsequent Chapter 4 we will discuss potential consequences if these decisions and rationales are applied to extra-EU IIAs.

3.1 Could CJEU Jurisprudence in Opinion 2/15 Affect Extra-EU IIAs?

As presented in section 2.2 above, the CJEU's Opinion 2/15 dealt with the legality of the first EU FTA including a chapter regarding investment protection.[57] The CJEU ruled that the EU may maintain control over foreign direct investment (FDI), in which an individual or company receives controlling ownership of a business in a different country through investments and purchases under EUSFTA, but did not extend the same regulatory authority to non-direct foreign investments, in which an individual investor, financial institution or company purchases stakes or positions of a foreign company on a foreign stock exchange.[58] In addition, the CJEU ruled that due to the exclusive competence acquired in the Lisbon Treaty over FDI, the EU has exclusive competence over the termination of existing IIAs between Member States and Singapore.[59] This is a critical finding, as it solidifies the possibility that the EU may terminate extra-EU IIAs if it desires to conclude an FTA with the same non-EU country (subject to transitional and termination provisions in the agreement). Finally, the CJEU ruled that the EU and EU Member States can create ISDS provisions in FTA agreements only under shared competence.[60] Thus, if EU Member States are bound by shared competence with the EU when implementing ISDS mechanisms in their extra-

[57] Opinion 2/15 , *supra* note 1 ,pages 29–32.
[58] Opinion 2/15, *supra* note 1, 232-245.
[59] Id., 246-249.
[60] Id., 292-293.

EU agreements, the EU can include EU law and legal precedents in extra-EU IIAs, including the recent precedents issued in the *Achmea* ruling and Opinion 1/17.[61]

As summarized in the table below, Opinion 2/15 expands the regulatory and legislative space of the EU regarding treaty-making, while leaving Member States with narrower options for exclusive authority.

Figure 1: Legislative and Regulatory Competence in Opinion 2/15

	Exclusive Competence	**Shared Competence**
EU	1. Foreign direct investment. 2. The termination and replacement of existing extra-EU IIAs between member states and non-member states after EU FTA and/or IIA.[62]	1. Non-direct foreign investment. 2. Creation of ISDS mechanisms.
Member States	The conclusion, termination and replacement of existing extra-EU IIAs if no FTA and/or IIA exists between the EU and third-countries, subject to authorization from the EU Commission.[63]	

[61] See chapter 3.2.2, 3.2.3.
[62] Opinion 2/15, *supra* note 1, 246: "Upon the entry into force of this Agreement, the [bilateral investment] agreements between Member States of the Union and Singapore … including the rights and obligations derived therefrom, shall cease to have effect and shall be replaced and superseded by this Agreement", para. 249: "European Union has competence to approve, by itself, a provision of an agreement concluded by it with a third State which stipulates that the commitments concerning direct investment contained in bilateral agreements previously concluded between Member States of the European Union and that third State must, upon the entry into force of that agreement concluded by the European Union, be regarded as replaced by the latter", 250 "On the other hand, as soon as such an agreement between the European Union and that third State enters into force, that authorisation ceases to exist".
[63] Opinion 2/15, *supra* note 1, 250.

3.2 Could CJEU Jurisprudence in *Achmea* Affect Extra-EU IIAs?

3.2.1 Could *Achmea* Apply to Extra-EU IIAs?

In *Achmea*, the CJEU ruled that due to its exclusive jurisdiction in interpreting EU law, the principle of autonomy of EU law prevents EU Member States from creating an ISDS mechanism in a joint IIA.[64] EU law autonomy[65] states that EU law is an independent legal order from public international law,[66] with its own constitutional framework, norms and principles.[67] If a law or treaty encroaches upon the autonomy of EU law, it may be incompatible with EU law.[68] Similar issues of EU law autonomy may arise in extra-EU IIAs requiring the binding application or interpretation of EU law, which could be viewed as an infringement upon EU law's autonomy.[69]

Additionally, the *Achmea* ruling paints IIA tribunals precluded by Art. 267 and 344 TFEU in broad strokes, by ruling against the formation of tribunals "**such as**" that included, of course, to begin with, the Netherlands-Slovakia IIA.[70] While the CJEU opinion of arbitral tribunals based on international agreements between two EU Member States (intra-EU IIAs) is therefore relatively clear, it is not at all clear what could otherwise qualify as agreements "such as". Relevant to this Memorandum is the possibility that arbitral tribunals established under extra-EU IIAs could be included, albeit indirectly, in the *Achmea* ruling's scope.[71] The lack of clarity in defining what agreements "such as" that the tribunal referred to in the *Achmea* ruling, is illustrated in the figure below. While there is certainty regarding the acceptable and non-acceptable tribunals (green and red, respectively), there are several constellations of tribunals with uncertain positioning.

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[64] Mauro Gatti, *Opinion 1/17 in Light of Achmea: Chronicle of an Opinion Foretold?*, 4 EUROPEAN PAPERS, 109 (2019) [Hereinafter: *Opinion 1/17 in Light of Achmea: Chronicle of an Opinion Foretold*].

[65] EU Law Autonomy is the principle that the EU is independent and free of legal influence. This principle was used in *Kadi I*,Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, Judgment of the Court (Grand Chamber) of 3 September 2008, ECLI:EU:C:2008:461.

[66] Tamás Molnár, *The Concept of Autonomy of EU Law from the Comparative Perspective of International Law and the Legal Systems of Member States*, 3 HUNGARIAN YEARBOOK OF INTERNATIONAL LAW AND EUROPEAN LAW 433–459 (2015).

[67]Opinion 2/13, of 18 December 2014, ECLI:EU:C:2014:2454 [hereinafter: Opinion 2/13], 158.

[68] Id., 172-178.

[69] *European American Investment Bank AG v. The Slovak Republic*, UNCITRAL, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, para. 118; *Achmea: Consequences on Applicable Law and ISDS Clauses in Extra-EU BITs and Future EU Trade and Investment Agreements*, *supra* note 19.

[70] T*he Uneasy Relationship between Intra-Eu Investment Tribunals and the Court of Justice's Achmea Judgment, supra* note 2, page 4.

[71] *Opinion 1/17 in Light of Achmea: Chronicle of an Opinion Foretold, supra* note 65, 110-112.

Figure 2: "Such As" agreements in Achmea - Possible interpretations

3.2.2 Counter-Arguments: Reasons Why *Achmea* Cannot Apply to Extra-EU IIAs

On the other hand, there is a case to be made for inapplicability of the *Achmea* decision's rationales to extra-EU IIAs. The *Achmea* ruling, that makes a strong case against arbitral tribunals under IIAs in EU law, revolves around a purely intra-EU IIA,[72] and a thorough reading of the case and of the terminology used within, provides hints at being intended for agreements solely between EU Member States. For instance, paragraph 34 of the *Achmea* ruling refers to the principle of mutual trust between EU Member States and their courts.[73] Mutual trust is a pillar of the EU legal system, and refers to fundamental trust between the judicial systems of Member States.[74] In *Achmea*, the court uses this principle as the basis for its ruling that intra-EU ISDS interrupts the cohesion and autonomy of EU law, undermining the trust between EU Member States and the EU legal system.[75] However, the principle of mutual trust is arguably not applicable vis-à-vis third countries or to international tribunals not anchored to an individual country's legal system. This is due to the inherent, and possibly fundamental, differences between countries' legal systems. While EU Member States all have EU law uniting and binding them, the same cannot be said of Member States and third countries. Therefore, the CJEU's logic that ISDS arbitration interferes with the mutual trust between the Member States should not apply to extra-EU IIAs.

[72] Id.
[73] *The Uneasy Relationship between Intra-Eu Investment Tribunals and the Court of Justice's Achmea Judgment*, *supra* note 2, 27.
[74] Opinion 2/13, *supra* note 68; Sacha Prechal, *Mutual Trust Before the Court of Justice of the European Union*, EUROPEAN PAPERS, 75-92, 76 (2017).
[75] *Achmea*, *supra* note 15, *para.* 34-46.

In addition, the *Achmea* ruling sets out three tests for determining whether an arbitral tribunal's decision-making under an intra-EU IIA is compatible with EU law, as shown in figure three below:[76]

1. No Interpretation of EU law - In paragraph 39-42 of *Achmea*, the CJEU determines that if the IIA refers to an EU host state's law, the agreement may be in violation of the EU's legal authority, as only the CJEU may interpret EU law and treaties.[77] The concern is that an arbitral tribunal's interpretation of EU law will interfere with the cohesion of EU law and with the CJEU's authority.[78] The court added that even the possibility of EU law interpretation is enough to render the arbitral tribunal incompatible with EU law.[79]
2. Not situated within the judicial system of the EU - In *Achmea,* the arbitral tribunal sat in Frankfurt and applied German law, however the Slovak-Dutch IIA was constituted under the UNCITRAL agreement.[80] In paragraph 43 of *Achmea*, the CJEU ruled that the arbitral tribunal cannot apply EU law without being part of a judicial body of a Member State, within the meaning of Art. 267 TFEU. This was viewed as necessary in order to refer issues to the CJEU to ensure "the full effectiveness of the rules of the EU".[81]

   While requiring that an arbitral tribunal be situated within the EU judicial system could create some "home court" advantages for Member States in extra-EU IIAs, this stipulation could in all likelihood apply in extra-EU IIAs.
3. Awards are subject to review by Member States - According to the UNCITRAL arbitration rules, tribunals may choose the law applicable to the procedure governing judicial review of the award.[82] However, according to paragraph 50 of the *Achmea* ruling, if an arbitral tribunal is not part of the EU judicial system, any awards issued by that tribunal must be "subject to review of a Member State" and by the CJEU.[83] Furthermore, in *Achmea*, the CJEU took issue with the limited review afforded in the tribunal's state seat.[84]

[76] Id., para. 32-60.
[77] *Achmea: Consequences on Applicable Law and ISDS Clauses in Extra-EU BITs and Future EU Trade and Investment Agreements, supra* note 19.
[78] *Opinion 1/17 in Light of Achmea: Chronicle of an Opinion Foretold, supra* note 65, 116-117.
[79] *Achmea, supra* note 15, para. 19-20.
[80] *Id., para.* 52.
[81] Id., para. 43.
[82] Id.
[83] *Opinion 1/17 in Light of Achmea: Chronicle of an Opinion Foretold, supra* note 65, 115.
[84] *Achmea, supra* note 15, para. 51.

below.

Figure 3: A comparison of how the three tests in *Achmea* might apply to extra-EU IIAs

Three Alternative *Achmea* Tests for EU Compatibility	**Why Extra-EU IIA Will Pass Test**	**Why Extra-EU IIA Will Not Pass Test**
No Interpretation of EU law	Interpretation of EU law as "a matter of fact" (Opinion 1/17) should prevent issues.	Low threshold for what constitutes interpretation. The possibility of EU law interpretation is enough to cause incompatibility with EU law.
Situated Within the Judicial System of the EU	An arbitral tribunal that is situated within the EU judicial system and ensures full effectiveness of EU law should not run into an issue with this test.	Arbitral Tribunals are grounded in international treaties, and are unlikely to be situated within the EU judicial system.
Awards Subject to a Member State's Review	A tribunal may sit in a EU Member State where the scope of judicial review is broad.	No guarantee that this will avoid the CJEU's standard of review for EU Member States.

Finally, the recent Termination Agreement, signed by 23 EU Member States in May 2020,[85] is a strong indicator as to the non-applicability of *Achmea* to extra-EU IIAs. The agreement specifically refers to intra-EU investment treaties as being opposed to EU jurisdiction as concluded in *Achmea* due to conflict with the EU Treaties and does not mention any *Achmea* related effect on extra-EU IIAs.[86]

[85] For more on the Agreement for the Termination of Intra-EU BITs, see chapter 2.5 above.
[86] *Termination Agreement.*

3.3 Could Opinion 1/17 Affect Extra-EU IIAs?

3.3.1 Could Opinion 1/17 Apply to Extra-EU IIAs?

Opinion 1/17 discussed constitutional issues relating to EU common commercial policy, while defining principles of EU law.[87] The Court concluded that the constitutional values that form the core of the EU must not be negatively affected by the CETA agreement.[88] In addition,[89] the court created a standard of independence for the dispute settlement mechanism in the CETA agreement that could be applicable to all EU Member States through EU law influence or superiority.[90] If so, then the 1/17 standard of independence from ISDS tribunals would be applicable to extra-EU IIAs. While this remains an open question in Opinion 1/17, when read in conjunction with the *Achmea* decision, it is possible to conclude that IIAs must be constituted under EU law jurisdiction and reviewed with complete dependence on the EU legal system, or that IIAs must be constituted solely under international law, with complete independence from the EU legal system, to the extent that this possible.

3.3.2 Counter-Arguments: Reasons Why Opinion 1/17 Cannot Apply to Extra-EU IIAs

Opinion 1/17 addressed ISDS in the particular and novel situation of the establishment of a standing investment tribunal between Canada, EU Member States and the EU as a whole under the CETA Agreement. The dispute settlement mechanism established in CETA is a permanent, multilateral tribunal system, representing an "important and radical change in investment rules and dispute resolution".[91]

As a CETA tribunal differs from arbitral tribunals constituted under intra-EU or extra-EU IIAs in the permanence of the CETA tribunal, the participation of the EU as a party to the agreement (and subsequently, the tribunal), it may be argued that the findings of Opinion 1/17 are not applicable to extra-EU IIAs.[92]

[87] Opinion 1/17, *supra* note 1, 119-156.
[88] Id., 110, 119.
[89] Id.,109, 195, 199-200.
[90] Marc Bungenberg & Catharine Titi, *CETA Opinion – Setting Conditions for the Future of ISDS* ,EJIL Talk (2019), https://www.ejiltalk.org/ceta-opinion-setting-conditions-for-the-future-of-isds/ (last visited Jun 13, 2020).
[91] Opinion 1/17, *supra* note 1, 44.
[92] Id.

The table below provides a comparison of the similar and different conditions of validity in *Achmea* and Opinion 1/17.

Figure 4: conditions of IIA validity in *Achmea* and Opinion 1/17

	Achmea	**Opinion 1/17**
Legal Question	Compatibility with EU law of arbitral tribunals in intra-EU IIAs.	Compatibility with EU law of an international treaty including the EU, EU Member States and third countries, in particular its ISDS.
Conditions of Validity	The arbitral tribunal does not limit EU law autonomy or apply or interpret EU law.	The dispute settlement mechanism does not limit EU autonomy or independence, and apply or interpret EU law, but rather implements EU law as a "matter of fact[93].
	Provides sufficient judicial review regarding issues of public policy, arbitrational review and enforcement.	N/A
	Ensures full effectiveness of EU law.	Ensures full effectiveness of EU law.
	Applies only international law or is subordinate to the EU legal system.	Applies only international law.

3.4 Could Differing CJEU Standards for Arbitral Tribunals' Judicial Review Affect Extra-EU IIAs?

In the *Achmea* ruling, the CJEU held the opinion that the judicial review provided for by German law in the arbitral tribunal's seat in Frankfurt regarding issues of public policy, arbitrational review

[93] CETA, *supra* note 16, Article 8.31, para. 2

and enforcement was insufficient.[94] As such, the CJEU ruled that disputes might fail to be resolved in a "manner that ensures the full effectiveness of EU law".[95] In contrast, in Opinion 1/17, the Court decided that in order to be valid under EU law the tribunal must apply international law only, in order to preserve EU law effectiveness and authority.[96] The common thread in both cases is the need to protect EU law and EU Member States in order to secure EU values.[97]

The CJEU's standard for judicial review may be applied to extra-EU IIAs, as one side of the agreement is under EU jurisdiction and the CJEU could still strive to provide the same level of judicial review and EU law effectiveness. While questions may be raised with regards to the CJEU standards on judicial review in extra-EU IIA, (should standards be lowered, or remain uniform to all IIAs? Should the CJEU accept the judicial review of a non-EU country, should the arbitration tribunal choose to sit there?), the CJEU's position on EU law effectiveness likely remains valid if one party to an IIA is an EU Member State.

Furthermore, even if the CJEU would apply the same standards to extra-EU IIAs and accepts the legal jurisdiction of a tribunal sitting in a non-member state, the question of award enforcement remains. As stated in the *Achmea* ruling, an EU Member State court must be able to review the compatibility of the award with EU law, providing domestic courts with more control over arbitral proceedings and awards.[98] As EU law applies to Member States' courts, including *Achmea* and Opinion 1/17,[99] it is possible that in order for extra-EU IIAs to be admissible in the eyes of the CJEU after *Achmea*, the IIA must accept the jurisdiction of the EU Member States' court to review any award under the agreement. If not, it is possible that even if the CJEU accepted third-countries' legal jurisdiction and judicial review process, it might decline to accept awards not subject to EU law review, or enforce any award against an EU Member State.[100]

[94] *Achmea, supra* note 15, 51-53.
[95] Id., 56.
[96] Opinion 1/17, *supra* note 15, 132-136.
[97] *Opinion 1/17 in Light of Achmea: Chronicle of an Opinion Foretold, supra* note 65, 117-118.
[98] Id., 115.
[99] *Achmea, supra* note 15, 20.
[100] *Id.,* 50-52.

3.5 Caught Between a Hammer and an Anvil: The Competing Loyalties and Obligations of States and Investors to EU Law and IIAs

Arbitral tribunals have successfully defended their jurisdiction against arguments of EU law in the past,[101] and it appears likely that tribunals will continue to do so, and not willingly accede their authority by accepting jurisdictional arguments of EU law. An example of the complications that may arise between the EU and ICSID arbitration can be found in the issue of state aid in the *Micula v. Romania* case. The arbitration proceedings focused on a Romanian tax incentive for investors that under EU law was viewed as unlawful state aid.[102] The EU opposed, in an *amicus curiae* brief, any Romanian compensation to the investors.[103] In 2015, the European Commission ruled (after Romania paid part of the award) that any payment made by Romania to the investors constitutes state aid and is therefore incompatible with EU law. The *Micula v. Romania* case emphasises the "hammer and anvil" situation in which countries and investors may find themselves in when EU law and ICSID rules and jurisdiction collide, and may cause awards to go unenforced (in the EU, at the least).[104]

Little has explicitly been said by the CJEU about extra-EU IIAs, beyond opinion 1/17 regarding CETA, and therefore there is no apparent direct conflict. However, the CJEU might include extra-EU IIAs under EU jurisdiction in Article 267 TFEU as an attempt to expand its jurisdictional control. If this occurs, EU Member States may find themselves torn between their obligations to IIAs and the CJEU. Even in the event that current case law does not include extra-EU IIAs, Member States might choose to adhere to their obligations under EU law, especially when they align with their interests.

[101] T*he Uneasy Relationship between Intra-Eu Investment Tribunals and the Court of Justice's Achmea Judgment, supra* note 2, 16.
[102] In the case, Romania ended the incentive prematurely as part of their effort to comply with EU law. However, from the perspective of the ICSID tribunal, the premature cancelation of this policy was a breach of the Fair and Equitable Treatment (FET) standard under the applicable IIA.
[103] CJEU, joined Cases T-624/15, T-694/15 and T-694.15, of 18 June 2019, ECLI:EU:T:2019:423, [hereinafter: *T-624/15, T-694/15 and T-694.15*] para. 17.
[104] *The Uneasy Relationship between Intra-Eu Investment Tribunals and the Court of Justice's Achmea Judgment, supra* note 2, 23.

3.6 Applicable law in Investment Arbitration Tribunals as a Factor in CJEU Jurisdiction

Beyond ISDS in IIA's strategic threats to EU authority and Member States' compliance with EU law, the *Achmea* case raises issues relating to jurisdiction, awards and enforcement of IIAs on the part of arbitral tribunals. As discussed in section 3.2,[105] *Achmea* is vague regarding the extent to which IIA arbitral tribunals are similar enough to the Netherlands-Czechoslovakia BIT to be precluded by EU law (the "such as" issue). It is for this reason that doubts have been raised regarding the admissibility and enforceability of extra-EU IIAs in the opinion of the CJEU, and over the applicability of *Achmea* to the law chosen as the basis of arbitration rules in the agreement.[106] Therefore, the applicable law clause of an IIA may become a critical factor to the applicability of *Achmea* to extra-EU IIAs.[107] The following discusses this issue with respect to several alternative applicable law clauses (for an overview, see figure five below).

3.6.1 IIAs That Apply EU or EU Member State's Law

In *Achmea*, the CJEU found that as the BIT stated that the domestic laws of contracting parties are part of the applicable law to the dispute, arbitral tribunals under the agreement would have no option other than to engage in interpreting EU law. Post-*Achmea*, it has become clear that if an intra-EU tribunal interprets an EU host state's law or EU law, the agreement is in violation of the EU's legal authority.[108]

As the tension between EU legal authority and arbitral tribunals' jurisdiction is more pronounced in an extra-EU IIA that applies EU law or a Member State's law, due to similar issues of EU law interpretation, the probability of a tribunal encountering *Achmea*-like issues is high. Furthermore, although arbitral tribunals are naturally inclined to uphold their own jurisdiction,[109] the CJEU's strong opposition to any interpretation or interference with EU law autonomy, and the position of

[105] See figure 2.
[106] Article 42, paragraph 1 of the ICSID Convention and article 35 of the UNCITRAL Arbitration rules allow parties to choose the rules of law that apply to a particular dispute, see *Achmea: Consequences on Applicable Law and ISDS Clauses in Extra-EU BITs and Future EU Trade and Investment Agreements*, *supra* note 19 , 105.
[107] *Id.* 104-107.
[108] *Termination Agreement*, *supra* note 88.
[109] T*he Uneasy Relationship between Intra-Eu Investment Tribunals and the Court of Justice's Achmea Judgment, supra* note 2, 16.

Member States regarding the non-conformity of arbitral tribunals with EU law (see recent Termination Agreement), may cause maintaining jurisdiction in a disagreement based on EU law to become a losing battle in the post-*Achmea* era. This is both due to the pressure Member States may face from EU institutions to conform to standards of EU law, and the possible unenforceability of awards from EU states and investors (see section 3.8 for discussion on award enforceability).[110]

3.6.2 IIAs That Apply International Law

An ongoing debate, that has been addressed repeatedly in arbitration proceedings, revolves around the question of whether EU law should be considered international law or domestic law. In the context of an international law-based arbitral tribunal, some of the practical applications of this question are that if EU law, including CJEU jurisprudence, is considered international law, *Achmea* could apply to extra-EU IIAs that contain applicable law clauses that call for exclusive application of international law,[111] or that IIAs could be overridden by Countries that join the EU (subject to the Vienna Convention on the Law of Treaties).[112]

The EU enjoys a *sui generis* nature which combines features of an international organization and a state.[113] The EU is recognised as an international legal entity composed of member states, derived from the TFEU and TEU treaties, and bound by norms and treaties of international law.[114] While it is commonly accepted that the EU is an actor of international law and international organization by treaty, EU law is not a traditional form of international law.[115] The CJEU maintains that international law is an integral part of EU law, and that the EU serves as a conduit between international law and Member States' legal systems.[116] For instance, in the seminal *Van Gend en*

[110] e.g. Micula. US District Court for the District of Columbia, Viorel Micula v The Government of Romania, Civil No 1:14-cv-00600 - Decision on the Claimant's Motion to confirm the ICSID Award
[111] The Energy Charter Treaty (1994); C.D Holding Internationale v. Hungary, ICSID Case No. ARB/13/35.
[112] *Achmea, supra* note 76, 41.
[113] Katarina Peročević, *European Union Legal Nature: Eu As Sui Generis - A Platypus-Like Society*, 4 INTEREULAWEAST: JOURNAL FOR THE INTERNATIONAL AND EUROPEAN LAW, ECONOMICS AND MARKET INTEGRATIONS 101–116 (2017).
[114] Id.
[115] Id.; Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR; NovEnergia II Italian Portfolio SA v The Italian Republic, Final Award, 23 December 2018, para 397.
[116] *Achmea, supra* note `5, 41.

Loos case, the CJEU found that the EU was "a new legal order of international law".[117] Another example of this argument was brought up by Germany in the *Vattenfall v. Germany* case, where the tribunal ruled that "EU law, to the extent of the TEU and TFEU, including their interpretation by the ECJ, constitutes a part of international law".[118] However, even in the event that EU law is considered international law, it would still be subject to rules of treaty succession and overlapping subject matter over competing international treaties in order for the *Achmea* ruling to preclude the IIA.[119] This was explored in the *Adamakopoulos v. Republic of Cyprus* case, a 2015 case concerning the merger of two Cypriot banks. In this case, Cyprus argued that EU law takes precedence over the ICSID based IIA with Greece as of the date of Cyprus' accession to the EU, based on the *Achmea* ruling.[120]

In 2020, the tribunal ruled that EU law components in Cyprus' domestic law were irrelevant to the tribunal's jurisdiction, which is derived from international law.[121] The tribunal underscored this by stating that jurisdictional arguments based on domestic law would defeat the purpose of IIAs. Furthermore, the tribunal found that if EU law is argued to be international law, then the issue revolves around the laws of succeeding treaties - the IIA in question under the ICSID treaty, and the EU Treaties.[122] The Tribunal accepted the claimants' argument that Art. 59(2) and 30(3) VCLT apply,[123] as the treaties mentioned have different subject matter.[124] The tribunal added that even if the treaties regarded the same subject matter, there is no evidence that the TFEU, as the treaty later in time, replaced the IIA, nor is there any incompatibility between the treaties.[125] As reflected in figure five, this is a telling case regarding the attitude of tribunals under IIAs towards the *Achmea*

[117] Case 26/62 NV Algemene Transport- en Expeditie Onderneming *van Gend & Loos v. Netherlands Inland Revenue Administration*, 1963 E.C.R, p.12.
[118] *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 6 December 2016, paras 148-155. [hereinafter: *Vattenfall v. Germany]*
[119] Theodoros Adamakopoulos and others v. Republic of Cyprus, ICSID Case No. ARB/15/49 page 11-12 [hereinafter*: Theodoros v. Cyprus*]
[120] Id. page 11-12.
[121] Id. page 45.
[122] Id. page 46.
[123] Vienna Convention on the Law of Treaties (United Nations [UN]) 1155 UNTS 331. [hereinafter:*VCLT*] Article 30(3) VCLT states that if "all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended (...), the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty" . Article 59(2) VCLT states that "The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties". Vienna Convention on the Law of Treaties
[124] *Theodoros v. Cyprus*, *supra* note 122, page 47.
[125] Id., page 51

ruling, consistently and systematically rejecting each argument for declining jurisdiction due to EU authority.

3.6.3 IIAs That Contain an Applicable Law Clause Providing for the Sole Application and Interpretation of Provisions Contained in the IIA Itself

Potentially, this type of an applicable law clause excludes the possibility of applying and interpreting EU law or the host state's domestic law.[126] However, there may still be situations in which tribunals may not be able to avoid the consideration of EU law, even when the IIA in question contains such an applicable law clause. One possible scenario to consider is a case in which EU law or the host state's domestic law is the cause for the violation of its international obligations under the IIA, as has been the case in ISDS. In such an event, the tribunal may be required to take into account, and sometimes even interpret, EU law. As noted already, according to the *Achmea* ruling, the interpretation of EU law by an arbitral tribunal conflicts with the principle of autonomy of EU law and therefore such a ruling and IIAs in question may be viewed as incompatible with EU law.

3.6.4 IIAs That are Silent on Applicable Law

In the event that parties to an IIA did not specify the applicable law, it is the norm to apply the residual rules of the arbitration forum chosen by the parties, commonly ICSID or UNCITRAL. In this case, EU law may be applicable; nonetheless, according to the definition contained in Art. 42, para. 1, of the ICSID Convention, "in the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute and such rules of international law as may be applicable".[127] Likewise, EU law may be deemed relevant according to Art. 35 of the 2010 UNCITRAL Arbitration Rules, which provide that "the arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate".[128]

[126] e.g. AAPL v. Sri Lanka ICSID, case no. ARB/87/3, award of 27 June 1990, page 533.
[127] Art. 42, ICSID Convention, Regulations and Rules. Washington, D.C.: International Centre for Settlement of Investment Disputes, 2003.
[128] Art. 35, United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985, with Amendments as Adopted in 2008 (Vienna: United Nations, 2008).

In light of Art. 42 of ICSID and Art. 35 of UNCITRAL, in the event that an EU Member state is a party to the dispute, EU law will be considered applicable and may inevitably require interpretation by the tribunal.[129] Moreover, should the tribunal apply the EU host state's domestic law, based on Art. 42 or 35, the tribunal could likely face *Achmea* based objections by EU parties, regarding its infringement on the autonomy of EU law.[130]

3.7 Enforceability of Extra-EU Awards

The final issue regarding the future of extra-EU IIA revolves around award enforcement. Following the *Achmea* ruling, the EU views the existence of arbitral tribunals under intra-EU IIAs as incompatible with EU law.[131] The recent Termination Agreement states that Member States must ask the relevant national court, including any third country, to annul and refrain from recognising and enforcing the arbitral award under intra-EU IIAs, or suspend or settle any pending arbitration proceedings.[132]

Furthermore, it is possible that the EU's position may allow parties to a dispute looking to avoid award enforcement to use the public policy exception in UNCITRAL article V(2)(b).[133] However, as there has been no change in the legal basis of IIAs from an international law standpoint, tribunals may be validly established and deliver awards.[134]

As mentioned throughout this chapter, even if there is no issue as to the establishment of arbitral tribunals under extra-EU IIAs, EU Member States and investors may attempt to avoid enforcing awards by claiming that they are precluded by doing so under EU law.[135] In the intra-EU *Micula v. Romania* case, for example, an ICSID award was not enforced out of concern that the award

[129] Christoph H. Schreuer et al., *Applicable Law*, *IN* THE ICSID CONVENTION: A COMMENTARY 545–639 (2 ed. 2009).
[130] *Achmea: Consequences on Applicable Law and ISDS Clauses in Extra-EU BITs and Future EU Trade and Investment Agreements*, *supra* note 19, 104.
[131] See *Euram v. Slovakia, Eureko B.V. v. The Slovak Republic, Masdar Solar v. Spain*, *Gavrilovic v. Republic of Croatia, UP and C.D Holding Internationale v. Hungary* and *Vattenfall v. Germany* for example.
[132] *Termination Agreement*, *supra* note 88.
[133] *international arbitration report*, *supra* note 36, page 30.
[134] *The Uneasy Relationship between Intra-Eu Investment Tribunals and the Court of Justice's Achmea Judgment*, *supra* note 2, 16.
[135] *Supra* note 113.

might be precluded by EU law.[136] Arbitration is often a lengthy and expensive process, and if awards ultimately go unenforced, it may cause a *de facto* chilling effect against pursuing arbitration against an EU Member State under an extra-EU IIA.[137]

Moreover, if the extra-EU IIA has not been terminated, or no change has been made in legal policies (by EU Member States or by EU governing bodies), it would be in bad faith on part of the Member State to avoid its treaty obligations to the parties of the agreement in question. In a more practical sense, arbitration under both the ICSID and UNCITRAL have mechanisms to avoid non-enforceability of awards. UNCITRAL, parties to a dispute may choose the seat of arbitration and the applicable law, so a specific seat of arbitration may be chosen in order to promote stability and avoid issues relating to the EU.[138] Under ICSID arbitration rules, an irrevocable principle of consent is established in Art. 25 and 26, meaning that no forum other than ICSID channels may be consulted (such as the CJEU), and no interference with arbitral proceedings is permitted.[139] Additionally, under Art. 53 and 54 awards are binding and not subject to appeal, and must be enforced by the convention member. However, while the aforementioned provisions may be helpful in avoiding unenforceability of awards, they do not entirely mitigate the risk of a domestic system in the EU granting precedence to EU law, as reflected in figure five below.

[136] For example, *Micula v Romania*, ICSID Case No ARB/05/20, IIC 621 (2013).
[137] *Supra note 113*.
[138] Robert Porubský & Ondrej Ponistiak, *The Importance of the Seat of Arbitration in the European Context*, CZECH YEARBOOK OF INTERNATIONAL LAW 239 (2016).
[139] Christoph H. Schreuer et al., E*xclusive Remedy*, *IN* THE ICSID CONVENTION: A COMMENTARY 348–413 (2 edition. 2009).

Figure 5: A possible comparison between the effects on jurisdiction and awards enforcement in extra-EU IIA's applicable law clauses in the wake of *Achmea*

Applicable law	Jurisdiction	Awards Enforcement
EU or EU Member State	High probability of *Achmea* related jurisdictional issues being raised by EU Member State or investor respondent.	High probability of *Achmea* related award enforcement issues.
International Law	Medium-high probability of *Achmea* related jurisdictional issues. Arguments may be raised regarding the status of EU law as international law, and whether EU law has normative superiority over international treaties.	Medium-high probability of *Achmea* related award enforcement issues. Arguments may be raised regarding the status of EU law as international law, and whether EU law has normative superiority over international treaties.
Interpretation of Provisions in IIA	Medium-low probability of *Achmea* related jurisdictional issues. A tribunal may need to consider or interpret EU law, but may limit their discussion on domestic law to a question of fact.	Medium-low probability of *Achmea* related award enforcement issues.
Silent on Applicable Law	Medium-high probability of *Achmea* related jurisdictional issues.	Medium-high probability of *Achmea* related award enforcement issues.

4 Possible Implications of CJEU Jurisprudence on Extra-EU International Investment Agreements

As follows from the analysis in chapter 3, it seems that there is in fact a possibility that the Achmea decision may, at least indirectly, have some effects on extra-EU investment agreements. As a result, there comes a need to identify the potential challenges third country investors may encounter while investing under extra-EU IIAs. The next chapter attempts to map these possible implications, while dividing the analysis into two levels. The first level focuses on identifying the potential implications deriving from the current legal uncertainty regarding the status of extra-EU IIAs, while the second level attempts to describe implications that may become possible in the event that the above mentioned CJEU jurisprudence, such as the *Achmea* ruling and the Termination Agreement, is formally applied to extra-EU IIAs.

4.1 Implications Deriving from Current Legal Uncertainties

At the current stage, it is unclear whether the *Achmea* ruling can be interpreted in a broader manner, making the decision's findings regarding arbitral tribunals and the autonomy of EU law applicable to extra-EU agreements as well. At the very least, it would appear that in some disputes arising under extra-EU IIAs, under certain types of applicable law clauses as mentioned in chapter 3, the autonomy of EU law may be affected similarly as in an intra-EU context. Seeing as EU law will almost inevitably be taken into consideration regarding various dispute matters, such as whether EU law, as part of the state's domestic law, was the cause for the breach of the IIA, or whether the award rendered could be enforced under EU law, which cannot be answered by an arbitral tribunal without taking into consideration EU law, are unavoidable. This is particularly relevant when an investor from a third-country brings a claim against an EU Member State. If EU law is deemed applicable to such extra-EU situations for the reasons listed in chapter 3, it could be difficult to avoid or work around the interpretation of EU law and its relevance to the dispute. However, as neither the CJEU in its *Achmea* ruling nor the EU and most of its Member States in the Termination Agreement, formally discuss the possibility of similar incompatibilities with EU law in disputes between EU Member States and third countries, there is still a lack of certainty regarding extra-EU disputes. This uncertainty itself regarding the *Achmea* decision's applicability to extra-EU arbitration has already proved to have some significant effects.

In this chapter, we will first examine the potential challenges third countries may face in future negotiations and renegotiations of IIAs with EU Member States. Second, we will observe jurisdictional objections based on the rulings in *Achmea*, as the decision seems to provide significant support to the familiar jurisdictional objection based on the autonomy and supremacy of EU law argument. Third, we will discuss the possibility of unenforceability of arbitral awards rendered in extra-EU disputes.

4.1.1 Challenges to Renegotiations of Existing Extra-EU IIAs and Negotiations of New IIAs Which Include an Investment Arbitration Clause

Due to the uncertainty regarding the applicability of the *Achmea* decision to extra-EU IIAs, it is possible that EU Member States may be less inclined to enter into negotiations of new BITs with third countries. More specifically, states that are members of the EU might be more reluctant to include arbitration clauses in future IIAs, as the compatibility of such clauses with EU law may be questioned,[140] and may essentially become unusable by their investors. The figures below list the extra-EU BITs signed by individual EU Member States, in the 3 years prior to and post *Achmea*.

[140] Center for International Environmental Law & ClientEarth , *Implications of Achmea* , p.2, *available at:* https://www.ciel.org/wp-content/uploads/2018/04/Implications-of-Achmea.pdf [hereinafter: *Implications of Achmea*]

Figure 6: extra-EU BITs signed prior to *Achmea* (from 2015 until March 2018)

Title	Date of Signature
Hungary - Iran, Islamic Republic of BIT (2017)	04/12/2017
Hungary - Tajikistan BIT (2017)	18/09/2017
Iran, Islamic Republic of - Luxembourg BIT (2017)	14/02/2017
Austria - Kyrgyzstan BIT (2016)	22/04/2016
Iran, Islamic Republic of - Slovakia BIT (2016)	19/01/2016
Denmark - Macedonia, The former Yugoslav Republic BIT (2015)	08/05/2015

Figure 7: extra-EU BITs signed post-*Achmea* (from March 2018 until today)

Title	Date of Signature
Cabo Verde - Hungary BIT (2019)	28/03/2019
Belarus - Hungary BIT (2019)	14/01/2019
Lithuania - Turkey BIT (2018)	28/08/2018

Before addressing the potential challenges in the negotiation of extra-EU IIAs, we must first question whether EU Member States can still negotiate IIAs with third countries. The authority to adopt legally binding acts that fall within areas of the EU's exclusive competence and authority is reserved exclusively to the institutions of the European Union, with the European Commission acting as the executive body, taking an active part in the negotiations, and the Council and Parliament granting their formal approval. Therefore, the EU Member States may only enter into IIAs if permitted to do so by EU primary or secondary law, as set out in the 2009 Lisbon Treaty.[141]

[141] Treaty on the Functioning of the European Union [hereinafter: TFEU], Art. 3, para. 1, and Art. 207.

As stated in Art. 8 of Regulation 1219/2012, when an EU Member state initiates negotiations of a BIT with a third country, it must first obtain the permission of the European Commission. After reviewing the relevant documentation, the Commission may refuse to authorize the negotiations on four alternative grounds.[142] The first and most relevant grounds for refusal in relation to the *Achmea* decision, is refusal on the basis that the resulting agreement will be incompatible with EU law.[143] If such conflicts arise, the Commission may grant authorization to continue negotiations on the condition that certain clauses be removed from the agreement.[144] Meanwhile, in the case of extensive incompatibilities, Art. 9, para. 5 of the Regulation allows the Commission to refuse authorization of the negotiations entirely, forcing the participating Member State to pull out of the negotiations, even at very advanced stages.[145] During the 7 year implementation period of the regulation, which ended on December 31, 2019, a total of 304 requests to open formal negotiations of new or existing extra-EU BITs were submitted to the Commission. Out of the total 304, 241 were authorized by the Commission, 22 were withdrawn by the Member States, 6 were rejected by the Commission, and another 35 are still pending. Additionally, a total of 76 requests to authorize the signing and concluding a newly negotiated agreement or to amend an existing agreement with a third country were submitted. Out of those 76, only 48 were authorized, 3 were withdrawn, and the remaining 25 were denied until submission of additional information by the Member States.[146]

[142] Regulation 1219/2012, *supra* note 22, Art. 9, para. 1,
[143] Id., Art. 9, para. 1(a); TFEU, supra note 144, Arts. 64, 66 and 75; Commission v. Austria C-205/06 and Commission v. Sweden C-249/06 of 3 March 2009, paras. 38–40; Angelos Dimopoulos, *EU Law Effects of EU Foreign Investment Law*, EU FOREIGN INVESTMENT LAW , 287–335, 310-318 (2011) - Some substantive areas in which such incompatibilities may arise include provisions regarding the free transfer of investment related funds without any exceptions (EU law provides for such exceptions), provisions regarding treatment of foreign investments (EU law imposes limitations on the rights of foreign investors to operate in the internal market), and provisions regarding equal treatment of all EU nationals within the internal market.
[144] Regulation 1219/2012, *supra* note 22, Art. 9, para. 2.
[145] Id., Art. 9, para. 5.
[146] *REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the application of Regulation (EU) No 1219/2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries*, 6 April 2020, *available at:* https://www.parlament.gv.at/PAKT/EU/XXVII/EU/01/75/EU_17528/imfname_10972108.pdf.

Figure 8: Distribution of 304 Requests submitted under Regulation 1219/2012 to <u>open formal negotiations</u> of new or existing extra-EU BITs (as of 31 December 2019)

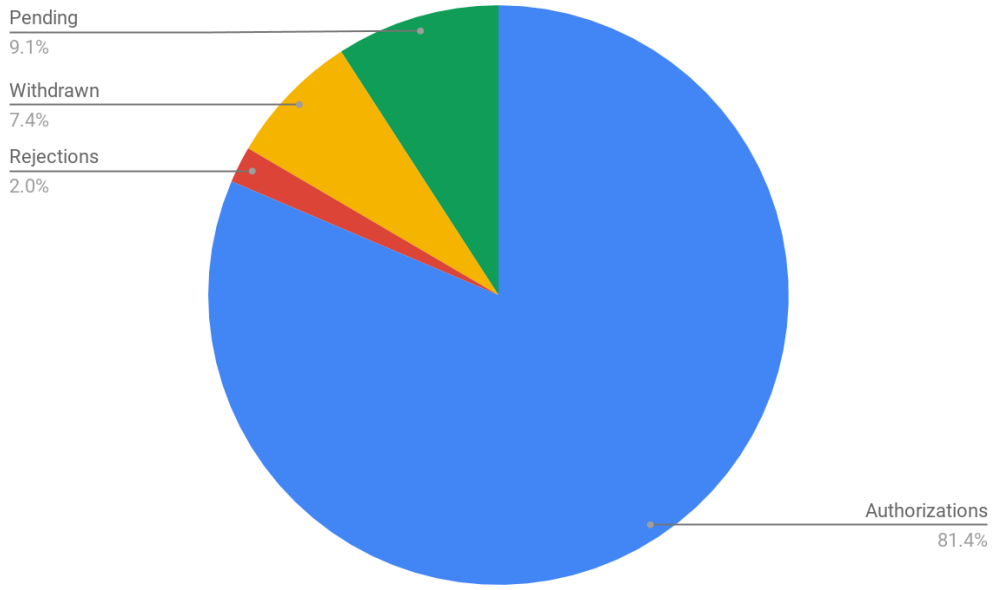
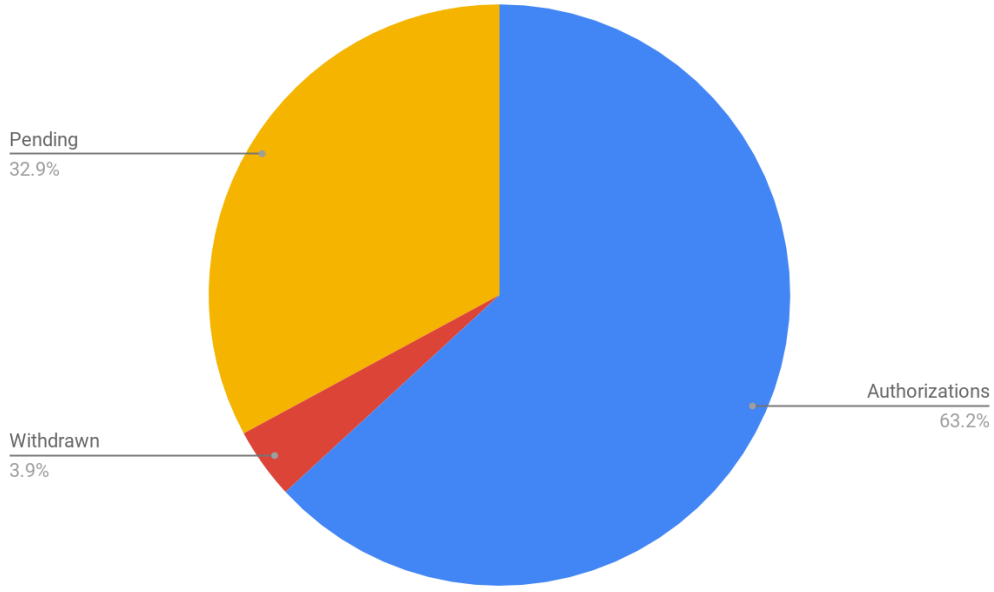


Figure 9: Distribution of 76 Requests submitted under Regulation 1219/2012 to <u>Conclude</u> new extra-EU BITs (as of 31 December 2019)



In conclusion, the terms set out in Regulation 1219/2012 clearly provide that while EU Member States seemingly have the legal competence to independently negotiate BITs with third countries, their legal competence to do so is dictated by the European Commission.[147] While Regulation 1219/2012 was in place prior to the issuing of the *Achmea* ruling, the grounds for refusal to authorize negotiations of a BIT based on its incompatibility with EU law as stated in Art. 9, para. 1(a) are fortified by the *Achmea* precedent. In other words, **due to the threat that arbitral proceedings impose on the autonomy of EU law, any extra-EU agreement which includes an arbitration clause allowing for the submission of disputes to an ad-hoc tribunal may be deemed incompatible with EU law as outlined in *Achmea*.** Therefore, the possible conflict with EU law now imposes a greater threat for future or ongoing negotiations of BITs between EU Member States and third countries, strictly limiting the Member States freedom to negotiate new agreements or amend existing ones.

4.1.2 Objections to Jurisdiction of Arbitral Tribunals Constituted under Extra-EU IIAs

Another valid concern for third countries maintaining investment relations with EU Member States is the possibility that the Member States that are respondents to an investment dispute may rely on elements of the *Achmea* ruling as an argument against the jurisdiction of arbitral tribunals.[148] A respondent Member State can simply argue against the tribunal's jurisdiction, or more severely, refuse to accept jurisdiction. While arbitration may proceed despite these objections, it may be essentially ineffective. This sub-chapter will discuss various jurisdictional objections prior to and post *Achmea* and their implications on extra-EU disputes.

Jurisdictional Objections Based on the Claim that EU Law Superseded the BIT Following the Member State's Accession to the EU

One possible ground for jurisdictional objections made by EU Member States prior to the *Achmea* ruling is based on the relatively simple argument that EU law superseded the BIT following the Member State's accession to the EU. Such an argument was made by the Czech Republic in the

[147] Schacherer, Stefanie, *Can EU Member States Still Negotiate BITs with Third Countries?*, IISD, 10 August 2016, *available at:* https://www.iisd.org/itn/2016/08/10/can-eu-member-states-still-negotiate-bits-with-third-countries-stefanie-schacherer/.
[148] *The Uneasy Relationship Between Intra-EU Investment Tribunals and the Achmea Decision* , supra note 2 ,page 8.

2014 *A11Y v. Czech Republic* case.[149] The Czech Republic objected to the tribunal's jurisdiction claiming that Art. 18 TFEU, which prohibits any discrimination between EU Member States, replaced the provisions of the BIT. Likewise, Art. 17 of the Charter of Fundamental Rights, stating that no one may be deprived of his or her possessions, was claimed to have taken the place of the BIT's provisions regarding expropriation of investments. Another example is Art. 63 TFEU, which prohibits all restrictions on the movement of capital between Member States, and therefore replaces the BITs provisions that guarantee investors the right to transfer their investments and returns freely.[150] The legal basis for this claim is Art. 30(3) VCLT which states that "individual provisions of a treaty can be derogated by a later treaty if they relate to the same subject-matter".[151] However, the Tribunal rejected these EU law objections and upheld jurisdiction. In this specific case, the tribunal did not spend much time reasoning its decision, simply stating that former investment tribunals have consistently held that EU treaties do not supersede intra-EU BITs.[152] Specifically, the tribunal claimed that "no common intention appears from the EU treaties or accession to the EU to terminate intra-EU BITs".[153]

The argument was addressed more thoroughly by the tribunal in the 2011 *Euram v. Slovakia* case, which stated that the BIT and the EU treaties do not have the same subject matter and therefore can be applied simultaneously, and even if the treaties were found to have the same subject matter,

[149] Menon, Trishna, *ICSID tribunal accepts jurisdiction over investor's claim under United Kingdom–Czechia BIT but rules in favour of Czechia*, 21 December 2018, *available at:* https://www.iisd.org/itn/2018/12/21/icsid-tribunal-accepts-jurisdiction-over-investors-claim-under-united-kingdom-czechia-bit-but-rules-in-favour-of-czechia-trishna-menon/. In this case, A11Y, a British company, invested in BRAILCOM, a Czech company that primarily specialized in providing visually impaired individuals with assistive technology solutions. In 2012, the Czech Republic initiated a governmental act that provided allowances to persons with health impairment, granting subsidies to purchases of assistive technology solutions such as the technology marketed by A11Y. Claiming that the new regulation had the effect of expropriating its investments in the country,

[150] *A11Y LTD. v. Czech Republic*, ICSID Case No. UNCT/15/1, para. 154-155 (2018). [hereinafter: LTD v. Czech Republic)

[151] VCLT, *supra* note 126, Art. 30(3)

[152] I*oan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmili S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, RL-68, para. 321; *Eastern Sugar BV v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007, RL-44, para. 167; *Achmea BV v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko BV v. The Slovak Republic*), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, RL-43, paras. 244-252; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, 30 April 2010, CL-94, paras. 80-85; *European American Investment Bank AG (Austria) v. The Slovak Republic*, UNCITRAL, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, CL-93, paras. 186-210.

[153] *LTD v. Czech Republic*, *supra* note 153,para. 171-172.

the EU treaties do not supersede the BIT because neither the EU treaties nor the behaviour of the Member State parties demonstrate the intent to terminate the BIT following accession to the EU.[154]

Jurisdictional Objections Based on the Claim that Art. 344 TFEU Prevents EU Member States from Resolving Intra-EU Disputes by Investment Arbitration Methods

Another jurisdictional objection which has been raised in the *Euram v. Slovakia* case[155] mentioned above is based on the claim that according to Art. 344 TFEU, all EU Member States have committed to resolving all disputes involving the application or interpretation of EU law explicitly by the methods of dispute settlement set out in the EU treaties.[156] The arbitral Tribunal in this case was not convinced by the argument that the CJEU has an interpretive monopoly regarding disputes involving EU law. The Tribunal based its decision on analysis of Art. 344 TFEU, concluding that the article "does not provide for an absolute monopoly of the ECJ over the interpretation and application of EU law".[157] Moreover, the Tribunal pointed out that "national courts and tribunals are frequently called upon to interpret and apply EU law and their action in doing so is in no way incompatible with EU law, even when (as is most commonly the case) they are located in Member States of the EU which are subject to the requirements of ... Article 344 TFEU".[158]

With regard to non-EU Member States, the Tribunal addressed the fact that third countries cannot submit questions of interpretation of EU law to the CJEU, yet they are not prevented from applying EU law when applicable under the applicable law clause of the IIA. The Tribunal referred to the example of an Argentinian court dealing with a dispute between an Argentinian company and a European company to demonstrate that in such a scenario the application of EU law is unavoidable. This raises the issue of whether or not the foreign court's interpretation of EU law is binding in the eyes of the EU in its Member States. Because the proceedings take place outside of Europe,

[154] E*uropean American Investment Bank AG v. The Slovak Republic*, UNCITRAL, PCA Case No. 2010-17, Award on Jurisdiction, 22 October 2012, para. 236. [hereinafter: *EAIB v. Slovak Republic]*.
[155] The Euram v. Slovakia case revolves around claims arising out of various legislative measures introduced by Slovakia that allegedly constituted a systematic reversal of the previous liberalization of the Slovak health insurance market. This liberalization had originally prompted the claimant, Euram Bank, to invest in the Slovak Republic's health insurance sector. Euram Bank, an Austrian investor, launched the arbitration proceedings in 2009 under the Austria-Slovakia BIT (1990).
[156] *EAIB v. Slovak Republic*, *supra* note 157, para. 243.
[157] *Id.*, para. 249.
[158] *Id.*, para. 250.

the tribunal stated that there seems to be no reason to require the intervention of the CJEU as an EU institution. However, the CJEU may intervene if the enforcement of the award inside Europe raises questions of compatibility with EU law. Additionally, on the subject of extra-EU disputes, it could also be argued that Art. 344 is not restricted to intra-EU cases, as the normal reading of the article refers to Member States' disputes involving EU law, yet does not specify with whom the dispute is. In short, the Tribunal emphasizes that "the control by the ECJ is not a certainty: it depends on the willingness of the court of the Member State where enforcement is sought to submit a question of interpretation to the ECJ" and therefore, the intervention of the CJEU when questions of EU law are raised remains only a possibility.[159] The issue of unenforceability of awards will be discussed in depth in the following section.

Jurisdictional Objections Post-*Achmea*:

Since the *Achmea* decision in March of 2018, some tribunals have found themselves required to address the issue of the compatibility of the arbitration clauses contained in various intra-EU IIAs with EU law – especially the ECT. For instance, in the *Masdar Solar v. Spain* case, the tribunal dismissed Spain's jurisdictional objection claiming that the "*Achmea* Judgment is simply silent on the subject of the ECT".[160] In another case, *UP and C.D Holding Internationale v. Hungary*, the tribunal upheld its jurisdiction and stated that Hungary cannot rely on EU law and the *Achmea* decision to escape its public international law obligations under the BIT as well as the ICSID Convention.[161]

Moreover, the most thorough analysis of the intra-EU *Achmea*-based objection to jurisdiction can be found in the *Vattenfall v. Germany* case, in which the tribunal concluded that EU law is not part of the general law applicable to the ECT and therefore the *Achmea* decision is irrelevant.[162] In conclusion, while their underlying reasoning varies, tribunals have generally remained unwavered by *Achmea*-based jurisdictional objections.

[159] *Id.*, para. 251.
[160] *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018, para. 682.
[161] UP and C.D Holding Internationale v. Hungary, ICSID Case No. ARB/13/35, Decision on Jurisdiction, 3 March 2016.
[162] *Vattenfall v. Germany, supra* note 121, para. 133.

In light of the above case law, it can be concluded that objections against the jurisdiction of investment tribunals on the basis of the supremacy and primacy of EU law have been quite common since the ratification of the Lisbon Treaty. However, it should be acknowledged that it is one thing for the Commission, as the "executive" body of the EU, to object against the jurisdiction of investment tribunals based on the supremacy of EU law. It is much more significant, however, when the CJEU, the "constitutional court" of the EU, holding the highest authority to interpret EU law, makes an official ruling that investment tribunals are incompatible with EU law. As demonstrated by the *Vattenfall v. Germany* example, it can be said that post-*Achmea*, the respondent Member States and the EU Commission now have much stronger grounds to back their objections. While the investment arbitration system is completely independent from the EU legal system, as investment tribunals are not subject to the rulings of the CJEU, the increasing tendency of EU Member States to object to the jurisdiction of arbitral tribunals, even more so following the *Achmea* ruling, may discourage investors, both from inside and outside the EU, from bringing their claims to arbitration. First, as those investors can anticipate a difficult battle at the jurisdictional stage of the proceedings, and second, due to the concern that even if the tribunal manages to uphold its jurisdiction, the awards rendered may not be enforced in EU Member States.[163]

4.1.3 Potential Unenforceability within the EU of Arbitral Awards Rendered under Extra-EU IIAs

While the European Commission views the existence of all arbitral tribunals under intra-EU BITs as precluded by EU law following the *Achmea* decision, and 23 of the Member States have agreed to terminate all such agreements following the ratification of the 2020 Termination Agreement, it is important to note that from the perspective of international law, the termination is not automatic. As far as international law is concerned, until the EU Member States do not act on the international level and actively terminate their BITs, also subject to the potential survival of pre-existing rights and the effectiveness of sunset clauses, arbitral tribunals may continue to be validly constituted, while subject to jurisdictional objections as discussed above, and even deliver awards that may be enforceable under the New York Convention or the ICSID Convention.[164] Moreover, the lack of

[163] *International arbitration report, supra note* 36 , page.29.
[164] *The Uneasy Relationship Between Intra-EU Investment Tribunals and the Achmea Decision , supra* note 2, page 16.

certainty in the wake of the *Achmea* decision raises concerns that the domestic courts and private entities of EU Member States, may not accept these awards as enforceable under EU law. While the issue of arbitral award unenforceability is particularly relevant to third country investors attempting to collect awards rendered to them under extra-EU BITs, for the sake of reciprocity, one may also consider the analogous question in the context of an EU investor attempting to collect an award in a third country. This raises the question of whether a court or financial institution in a third country may also refuse to enforce an award on the grounds that it was not validly rendered due to lack of jurisdiction, making the award unenforceable outside the EU.

Difficulties in Enforcing Arbitral Awards - the *Micula v. Romania* Case:

An example of a case in which the jurisdiction of the tribunal itself was not objected to for lack of compliance with EU law, but the **award delivered by the tribunal was deemed by the European Commission to be incompatible with EU law** is the *Micula v. Romania* case mentioned in chapter 3.[165] In their strenuous efforts to oppose the award, Romania and the Commission both relied on the *Achmea* judgment, arguing that it had the effect of rendering the arbitration agreement in the Sweden-Romania BIT invalid and unenforceable.[166] In 2015, after Romania had partially paid the award, the Commission issued a decision ordering Romania to cease all future payments and recover any part of the award that had already been paid.

In 2019, after taking into consideration the new precedent set by the CJEU in *Achmea,* the General Court annulled the Commission's 2015 decision and ordered Romania to pay the award. The General Court argued that neither EU law nor the recent *Achmea* ruling are applicable to the case since the tax incentives withdrawn by Romania were put in place prior to its accession to the EU. Therefore, the *Micula* tribunal did not have to interpret or apply EU law in reaching its decision. In the court's words, "the arbitral tribunal was not bound to apply EU law to events occurring prior to the accession before it".

[165] *Id.,* page 18.

[166] After the Micula Tribunal announced its ruling on the case, the European Commission opposed the compensation awarded by the tribunal on the grounds that any ruling of the arbitral Tribunal compensating the investors for the loss of the privileges abolished by Romania, would constitute state aid incompatible with EU state aid rules. Similarly, Romania itself requested the annulment of the award before an ad hoc ICSID Committee claiming that the Romanian Constitutional Court gave precedence to the primacy of EU law over Romania's international obligations under ICSID.

This decision contradicts the guidelines set in *Achmea*, as it upholds an award which constitutes state aid as prohibited by EU law.[167] However, the decision was appealed once more until the 15 year long *Micula* saga finally came to an end on 19 February 2020, when the UK Supreme Court ("UKSC") lifted the stay on enforcement of the ICSID Award asserting that the UK's enforcement obligations under the ICSID Convention are not superseded by its EU duties, as the UK's ratification of the ICSID Convention preceded its accession to the EU.[168]

In light of the above, a lot can be learned from the *Micula* case regarding the enforceability of arbitral awards in the EU. First, while the *Micula v. Romania* case deals explicitly with the issue of tax incentives constituting state aid, the case stresses the potential challenges investors may face in attempts to enforce arbitral awards in the EU. The case demonstrates the ambitious efforts of the European Commission to resist awards rendered by arbitral tribunals, issuing decisions to prevent the recognition and enforcement of arbitral awards and ordering Member States to stop the transfer of payments to a claimant. Such measures can also be taken by the Commission to resist awards rendered to third country investors under extra-EU BITs if they do not comply with EU law. The UKSC raised its concern regarding future conflicts between EU law and the enforceability of awards under the ICSID Convention as the EU itself is not a party to the Convention.[169]

Second, another point of significance pointed out by the UKSC is that while there is a possibility that the Commission might bring infringement proceedings against the UK for the enforcement of an award which it deemed incompatible with EU law, the situation is unlikely, partially due to the fact that the UK is currently in the process of withdrawing from the EU.[170] Moreover, the *Achmea* ruling now provides a much stronger basis for such opposition, and while the General Court and UKSC did not accept these objections, this specific case was concerned with tax incentives which

[167] *T-624/15, T-694/15 and T-694.15, Supra* note 106, para. 87.
[168] Micula and others v Romania [2020] UKSC 5, UKSC 2018/0177, 19 February 2020 [hereinafter: *Micula and others v Romania*] para. 118.
[169] Id., para. 116.
[170] Id., para. 116-117.

were put in place *before* Romania's accession to the EU. Therefore, the outcome might not be similar in recent cases.

Furthermore, although investors from the EU may continue to rely fully on the system of investment protection offered under extra-EU agreements in third countries, investors from third countries may not benefit from the same level of reciprocity within the EU. The main concern is that awards granted by tribunals to third country investors could be challenged and become unenforceable in EU courts as they may be viewed as being incompatible with EU law. At the very least, *Achmea* casts considerable legal uncertainty over such investment agreements, diminishing any potential advantage they bring to foreign investors.[171] EU national courts will need to choose between their obligations under EU law, their investment agreements, ICSID and New York Conventions and while the UKSC was able to support the UK's international obligation under the ICSID Convention when in conflict with EU law, it may not be as simple for EU Member States that are still fully a part of the EU.

4.2 Possible Implications if CJEU Jurisprudence is Formally Applied to Extra-EU IIAs

There are a few possible scenarios to consider in the event that the above mentioned CJEU jurisprudence's applicability is extended to include extra-EU BITs. First, there is the 'pure' extra-EU situation of a third country investor investing in an EU Member State, such as buying real estate, shares of a company, or any form of investment. Second, a more complicated scenario is the case of a third country investor investing in an EU Member State through a corporation registered in another EU Member State. At first glance, it may seem as if a European corporation investing in another EU Member State is easily classified as a simple intra-EU investment and therefore there is no question regarding the relevance of the *Achmea* decision. However, Art. 25 ICSID makes the classification of such investments a bit more complicated. Art. 25, para. 1 ICSID states that "the jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State... and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre". Art. 25, para. 2 goes on to define the term "national of another Contracting State" to also include corporations that are officially

[171] *Implications of Achmea*, *supra* note 143, page 7.

registered in one state (such as an EU Member State), but are owned by an investor in other state, to be regarded as a third country investor for the purposes of arbitration under ICSID.[172] In this scenario, it may be controversial whether such an investment dispute should be regarded as purely extra-EU, and therefore potentially not subject to the *Achmea* ruling, or as partially intra-EU.

An example of this argument can be found in the *Eskosol in liquidazione v. Italy* case, in which Eskosol, an Italian company, sued Italy invoking "foreign control," under Art. 25.2 ICSID because 80% of its shares were owned by a Belgian company.[173]

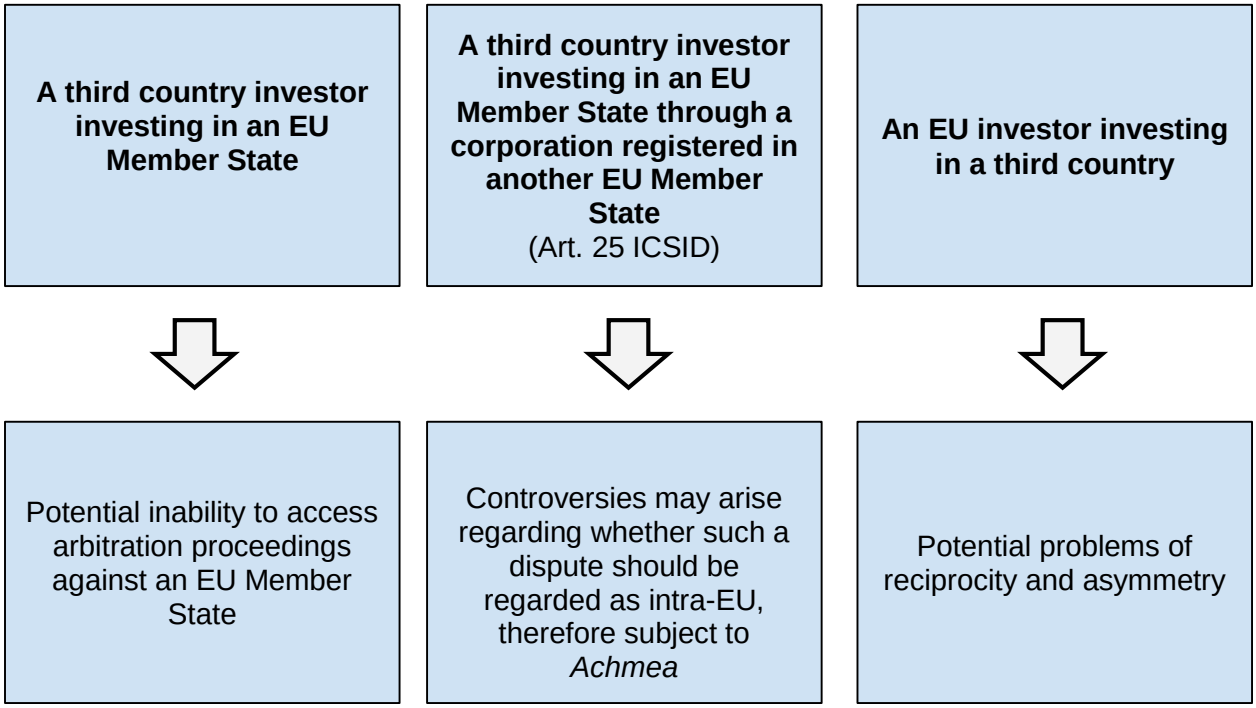
Another controversial question may be whether arbitral proceedings in such a case, involving a European corporation and a respondent EU Member State, will be able to avoid interpreting EU law. As the corporation, while owned by a national of a third country, is registered in an EU Member State, EU law will likely be taken into consideration as part of the domestic law of the investing party and the host state, making the *Achmea* decision nonetheless relevant. However, if Art. 25 ICSID will in fact allow European corporations to access investment arbitration under extra-EU IIAs, because of foreign, third country ownership, two main problems may arise. First, there may be a conflict with the non-discrimination principle in EU law, as Art. 25 ICSID essentially provides certain European corporations with an additional judicial remedy under an extra-EU IIA, due to the nationality of its foreign shareholders, that is not available to locally owned European corporations. Second, if Art. 25 ICSID becomes a way to circumvent the *Achmea* decision and take advantage of investment arbitration methods provided under extra-EU IIAs, it raises the concern that the place of incorporation and ownership will become subject to manipulations beyond those that already exist. For instance, European corporations may consider keeping part of their shares owned by foreign, extra-EU investors in order to ensure their ability to utilize arbitration methods under extra-EU IIAs.

A third scenario is the reverse situation in which an investor from a Member State, investing in a third country, brings arbitration proceedings against that third country under an extra-EU IIA.

[172] Art. 25 ICSID Convention, Regulations and Rules. Washington, D.C.: *International Centre for Settlement of Investment Disputes*, 2003.
[173] Eskosol S.p.A. in liquidazione v. Italian Republic ICSID Case No. ARB/15/50, 20 March 2017.

While the interpretation of EU law will be more difficult to avoid when the dispute is settled in a tribunal seated in an EU Member State, it is generally less likely that EU law will be of relevance in such reverse scenarios. However, this raises the problem of asymmetry. While third country investors in the EU may lose their IIA protection, EU investors in third countries may continue to take advantage of their right to settle disputes by investment arbitration under extra-EU IIAs. In scenarios such as the ones discussed above, the *Achmea* decision may be found relevant and applicable to disputes that are of extra-EU nature, therefore having a direct or indirect impact on third countries which are parties to IIAs with EU Member States and their investors. In other words, it is possible that a non-EU host state facing a claim by an EU investor under an extra-EU IIA may claim lack of jurisdiction because the claim raises issues of EU law. As provided in figure 10, additional possible implications may arise in any of the scenarios described above.

Figure 10: possible scenarios that may raise challenges in the event that arbitration clauses in extra-EU IIAs are deemed incompatible with EU law



4.2.1 Art. 351 TFEU Calls for the Elimination of any Incompatibilities in Existing Extra-EU IIAs with the EU Treaties

Art. 351 TFEU addresses the compatibility of agreements between EU Member States and third countries, particularly agreements that were concluded before the Member States' accession to the EU. At first glance, it seems as if agreements with third countries remain valid, as can be learned from the language of Art. 351, para. 1 whereby such agreements "shall not be affected by the provisions of the Treaties". However, at least two further questions arise. First, does Art. 351, para. 1, upholding the validity of extra-EU agreements, refer only to agreements concluded *before* the Member States' accession to the EU? If the article was to be given this narrow interpretation, what should be done with agreements concluded between third countries and Member States *after* their accession into the EU? Second, it cannot be ignored that Art. 351, para. 2 goes on to instruct that **"to the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established"**. In the event that *Achmea* is extended to cover any IIAs which include an arbitration clause allowing tribunals outside of the EU legal system to apply and interpret EU law, thus including extra-EU IIAs as well, such an event may trigger an obligation to terminate or at least amend and renegotiate certain provisions in extra-EU IIAs.[174] Nonetheless, the *Achmea* decision, which provides a clear ruling by the CJEU that bringing investment disputes which require the application or interpretation of EU law to arbitral tribunals is "not compatible with the [EU] Treaties", as defined in Art. 351, para. 2 above, now defines a relatively clear area of incompliance with EU law. This non-compliance with EU law, may require Member States to terminate or amend certain provisions in existing extra-EU agreements, specifically provisions which allow or require disputes to be submitted to ad-hoc investment tribunals.

4.2.2 Absence of IIA Protection for EU Investors in Third Countries

If the validity of arbitration clauses in extra-EU IIAs is put in question following the scenarios explained above, it could also weaken the protection given to EU investors investing outside the

[174] Hindelang, Steffen, *The Limited Immediate Effects of CJEU's Achmea Judgement*, VERFBLOG, 09 march 2018, *available at*: https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/ [hereinafter: *The Limited Immediate Effects of CJEU's Achmea Judgement]*

EU. There are essentially two issues regarding the investment protection available for EU investors in third countries. First, it may be subject for speculation whether a third country host state could effectively argue that an arbitral tribunal constituted under an extra-EU IIA has no jurisdiction due to the incompatibility of arbitral tribunals with EU law as stated in the *Achmea* decision. In such a scenario, the third country host state may argue that the IIA cannot be adjudicated due to the need to interpret and apply EU law. Even if such objections on the host state's part aren't raised at the jurisdictional level, they may be brought up later in the proceedings as grounds for refusing to enforce an arbitral award.

Second, in the event that the *Achmea* ruling and Opinion 1/17 create a lack of reciprocity, as they may release third country host states from their obligations under extra-EU IIAs, the only investment protection available for EU investors abroad is that provided by the domestic law of the host state. The termination of intra-EU BITs is less harmful for EU investors investing inside the EU since they are still granted protection under EU law.[175] Furthermore, the European Commission is currently working towards a policy on intra-EU investment protection and facilitation that will cover areas that were previously addressed by intra-EU BITs prior to their termination. While there is no consistency among the judicial systems of the different EU Member States, some Member States still boast high quality court systems where investors can bring their claims to.[176] Meanwhile, the only alternative for those EU investors investing outside the EU in the event of a dispute is to bring their claims to the domestic courts and institutions of the host states. The settlement of disputes by arbitration often grants an advantage to foreign investors who have the means to take advantage of the method, rather than resorting to the domestic legal system of the host state. As the domestic law is different in every state, and host states may amend existing legal conditions and pass new laws, it may be difficult for foreign investors to rely on them and build long term expectations. When EU investors invest in a third country that is party to an extra-EU IIA, the investors will continue to be protected by the agreed upon provisions, even in the event of a change in the host state's domestic law, as amending a BIT requires bilateral consent and it will therefore continue to provide certainty and immunity to domestic changes. Essentially,

[175] EU law includes provisions that guarantee protection of fundamental freedoms such as the free movement of capital, non-discrimination, proportionality, legal certainty and protection of legitimate expectations.
[176] I*nternational Arbitration Report*, *supra* note 36, page 31.

in the event that arbitration under extra-EU IIAs becomes unavailable, EU investors will find themselves at a disadvantage to other foreign investors that are nationals of countries that maintain effective IIAs with the relevant host state. The concerns addressed above may lead to an asymmetrical reality, which may have damaging effects to EU investors.

4.2.3 Difference in Bargaining Power between the EU and Third Countries in the Event of Renegotiation

If arbitration clauses in extra-EU BITs are deemed incompatible with EU law, all extra-EU BITs may need to be renegotiated. A logical prediction, in light of the Lisbon Treaty and the EU's agenda, may be that third countries will no longer be negotiating with the individual EU Member States, but with the EU as a whole. This scenario serves the EU's goal of ensuring equality among the EU Member States and their investors while also guaranteeing that all future IIAs will be compatible with EU law. This also suits the CJEU's conclusion in Opinion 1/17 in which an arbitration mechanism in a multilateral agreement negotiated by the EU and a third country was held compatible with EU law. While small EU economies may benefit from the protection provided by the EU umbrella, small economies who are not members if the EU may be substantially hurt by such renegotiations since they are at an instant loss against the EU's impressive bargaining power.

5 How can Third Countries Continue to Provide Protection to their Investors in EU Member States?

Like a canary in a coal mine, as the implications of the *Achmea* ruling on intra-EU IIAs have become clearer following the recent publication of the Termination Agreement, it is now easier to identify specific elements that were deemed incompatible with EU law in intra-EU IIAs. Third countries that are parties to IIAs with EU Member States can learn from the developments in intra-EU context and take steps to eliminate similar incompatibilities in their extra-EU IIAs in order to ensure their compliance with EU law. Another valid concern is that many if not most investors currently investing under extra-EU IIAs may be unaware of the potential implications addressed above. Therefore, it may be even more crucial for countries that are a party to an extra-EU IIA to act on the matter and take measures to ensure an adequate level of protection to their investors. The steps laid out in this chapter may be essential in order to ensure reciprocity in existing extra-EU IIAs. In particular, while third countries may comply with future arbitral proceedings launched against them by an EU investor under an existing BIT with an EU Member State, third country investors investing in EU Member States may not enjoy the same treatment. The concern is that while third countries will continue to abide by the provisions of extra-EU IIAs in force, the EU Member State parties might object to the Tribunals' jurisdiction or refuse to comply with rendered awards, backing their arguments with the recent CJEU jurisprudence discussed in the previous chapters. In the next sub-chapters, we will suggest certain measures that third countries that are a party to an extra-EU BIT should consider implementing in order to minimize the lack of reciprocity and risk of asymmetrical effects.

5.1 Applicable Law Clauses

As discussed in chapter 3, the wording of the applicable law clauses in extra-EU BITs may become crucial as part of the interpretation of extra-EU agreements in the event of an investment dispute between a third country and an EU Member State or an EU investor. For instance, in the *Achmea* case, the applicable law clause in Art. 8, para. 6 of the Czechoslovakia-Netherlands BIT was of significant importance to the Court's findings. According to Art. 8, para. 6, the applicable law in this case included "the law in force of the Contracting Party concerned" and "other relevant agreements between the Contracting Parties". Taking into account that EU law is part of the law

in force in every Member State and derives from the TFEU, which constitutes an international agreement between the Member States, the CJEU concluded that there is no way an arbitral tribunal established pursuant to the Czechoslovakia-Netherlands BIT can avoid interpreting EU law.[177] BITs can be classified into four main categories depending on the wording of their applicable law clause, as described in chapter 3. Each category may be interpreted differently in terms of the relevance of the *Achmea* decision, as described in figure 11 below.

[177] *Achmea: Consequences on Applicable Law and ISDS Clauses in Extra-EU BITs and Future EU Trade and Investment Agreements, supra note 19.*

Figure 11: Applicable Law Clauses - Conflicts and Suggestions

Applicable law	Potential conflict with the autonomy of EU Law	Suggestion to resolve potential incompatibilities
EU or EU Member State	Clear application of EU law.	EU law should be regarded strictly as a matter of fact.
International Law	Risk of EU law being considered applicable due to the fact that EU law may be characterized as both domestic and EU law.	Even if EU law was to be regarded as part of international law, it does not constitute principles of international law applicable as such to the interpretation and application of the arbitration clause in another treaty (*Vattenfall v. Germany*).
Sole Interpretation of Provisions in IIA	Potentially excludes the possibility of applying and interpreting EU law, except for specific cases for example - if EU law was the cause for the breach of the IIA.	EU law should be regarded strictly as a matter of fact.
Silent on Applicable Law	EU law will most likely be considered applicable to an extra-EU IIA according to Art. 42 ICSID and Art. 35 UNCITRAL, as the domestic law of the Member State party.	Step 1 - the Tribunal will interpret the silence of the agreement on its applicable law as including EU law. Step 2 - by making EU law applicable, the Tribunal will take into account the *Achmea* ruling and Art. 344 TFEU which will prevent it from interpreting EU law. Another option will be limiting that EU law will be regarded strictly as a matter of fact.

BITs That Apply EU or EU Member State's Law

BITs in this category typically contain provisions that call for the application of "the law in force of the Contracting Party concerned" and "other relevant agreements between the Contracting Parties". As EU law is an inseparable part of the law in force of EU Member States, EU law will most certainly be found applicable and arbitral tribunals constituted under such agreements will have no option other than interpreting EU law.

BITs that contain an applicable law clause that provides for the sole application and interpretation of international law:

The second category includes agreements that define their applicable law as simply international law.[178] An ongoing debate which has been addressed repeatedly in arbitration proceedings revolves around the question of whether EU law should be considered international law or simply domestic law. An example of this argument was brought up by Germany in the *Vattenfall v. Germany* case. EU law enjoys a *sui generis* nature which "combines features both of an international organization and of a state", therefore, there is a major difference of opinion on the classification of EU law and whether it should be considered as international or domestic law. In these cases, the applicability of EU law is possible, yet uncertain.

Over the years, EU law has been classified as part of international law in certain disputes. In the *Van Gend en Loos* case, the ECJ found that the EU law constituted "a new legal order of international law".[179] Similarly, in the *Vattenfall v. Germany* case, the Tribunal concluded that "EU law, to the extent of the TEU and the TFEU, including their interpretation by the ECJ, constitutes a part of international law".[180] Finally, in the *Achmea* ruling, the CJEU also stated that "EU law must be regarded both as forming part of the law in force in every Member State and as deriving from an international agreement between the Member States".[181] These examples show that EU law has been found applicable even in agreements including an applicable law clause limited specifically to international law. It is important to note that while The *Van Gend en Loos* and the

[178] Agreements that contain applicable law clauses with such wording include the Energy Charter Treaty or the 1991 France-Hungary BIT.
[179] Case 26/62 NV Algemene Transport- en Expeditie Onderneming *van Gend & Loos v. Netherlands Inland Revenue Administration*, 1963 E.C.R, p.12.
[180] *Vattenfall v. Germany, supra* note 121, para. 148-155.
[181] *Achmea, supra* note 15, para. 41.

Achmea decisions were given by Courts that are part of the EU legal system, the *Vattenfall* case, settled by an ICSID Tribunal, has reached the same conclusion and found EU law applicable, despite the distinction between EU law and international law perspective.

Regardless of whether EU law is considered part of international law or as purely domestic law, we find it appropriate to quote the *Vattenfall v. Germany* Tribunal which stated that even if EU law was to be regarded as part of international law, it does not constitute "principles of international law which may be used to derive meaning from Art. 26 ECT, since EU law is not general law applicable as such to the interpretation and application of the arbitration clause in another treaty such as the ECT".[182] In other words, even if EU law is considered to be part of international law, the mere classification is not enough to make it relevant to the interpretation of the arbitration clause in another treaty.

<u>BITs that contain an applicable law clause that provides for the sole application and interpretation of provisions contained in the BIT itself:</u>

The third category includes agreements that limit their applicable law to the provisions of the agreement itself. In order to avoid such potential incompatibilities with EU law, we would like to point out that international courts and tribunals with jurisdiction to consider whether a state has complied with its international treaty obligations typically limit themselves to considering the parties to the dispute's national law as a question of fact.[183] This matter was explicitly addressed in the Permanent Court of Justice judgement in the *Certain German Interests in Polish Upper Silesia* case, in which the court stated that "from the standpoint of International Law… municipal laws are merely facts". The Court went on to clarify that "the Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Court's giving judgment on the question whether or not, in applying that law, Poland is acting in conformity with its obligations towards Germany under the Geneva Convention".[184] This conclusion was emphasized repeatedly

[182] *Vattenfall v. German, supra* note 121, para. 133.
[183] *Achmea: Consequences on Applicable Law and ISDS Clauses in Extra-EU BITs and Future EU Trade and Investment Agreements*, *supra* note 19.
[184] Permanent Court of International Justice, judgment of 25 May 1925, *Certain German Interests in Polish Upper Silesia* (Germany v. Poland).

by a number of WTO Panels claiming that municipal law should be viewed as an issue of fact.[185] By observing EU as well as domestic law in this manner, EU law is therefore not subject to interpretation.

BITs that are silent on the applicable law:

The fourth and last category includes BITs that do not address their desired applicable law. As discussed in chapter 3, according to Art. 42 ICSID and Art. 35 UNCITRAL, EU law will most likely be considered applicable to an extra-EU IIA as the domestic law of the Member State party, therefore imposing the risk of potential infringement of the autonomy of EU law. However, we suggest a different approach that may allow the tribunal to avoid applying EU law and thereby questioning the compatibility of the entire agreement. Our suggested approach consists of two steps. In the first step, the Tribunal will interpret the silence of the agreement on its applicable law as including EU law. In the second step, however, by making EU law applicable, the Tribunal will take into account the *Achmea* ruling and Art. 344 TFEU which will prevent it from interpreting EU law. This approach is based on the principle of judicial comity, which calls on courts to refer to other courts' decisions when appropriate. The principle of judicial comity encourages coordination and harmonization between different dispute settlement systems, particularly, for the purpose of our discussion, between domestic and international courts. This practice is likely to increase the legitimacy of judicial outcomes.[186] This narrow approach may strengthen the validity of BITs that are silent on the applicable law and do not clearly state that EU law should or should not be interpreted as to avoid incompatibility issues following the *Achmea* ruling.

Carving the interpretation of EU law out of the scope of the Applicable law clause

An attempt to ensure the non-application of EU law in all of the categories discussed above can be done by the construction of an applicable law clause similar to Art. 8.31 CETA which states that **"in determining the consistency of a measure with this Agreement, the Tribunal may**

[185] WTO AB, panel report of 19 December 1997, no. WT/DS152/R, in *India v. United States – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, para. 66; WTO, panel report of 28 February 2000, case no. ds152, *European Communities v. United States*, US – Section 301, para. 7.

[186] Yuval Shany, *Jurisdictional Competition between National and International Courts: Could International Jurisdiction-Regulating Rules Apply?*, SSRN ELECTRONIC JOURNAL, 166-167 (2006)

consider, as appropriate, the domestic law of a Party as a matter of fact".[187] Implementing an applicable law clause of this sort will reduce the risk of potential infringements of the autonomy of EU law. Therefore, we recommend including the above wording in future agreements with EU Member States or in the event that an agreement is being renegotiated and thus the applicable law clause can be amended.

5.2 Joint Interpretive Instruments

As for existing IIAs with EU Member States, in which the applicable law clause leaves room for possible application of EU law, we recommend adding a joint interpretive note to agreements with EU Member States. The note, which will be based on the conclusions of Opinion 1/17, will clarify that **in the event of a dispute, EU law and any applicable domestic law should only be observed by the tribunal as a matter of fact.** In this manner, almost all possibilities of interpreting EU law in a way that infringes upon its autonomy will be eliminated.

The practice of implementing joint interpretive instruments in international agreements was originally introduced in the 1994 NAFTA agreements.[188] Since then, the practice has become increasingly popular and similar joint interpretive instruments can now be found in various agreements including the ASEAN Comprehensive Agreement (ACIA), the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) and more.[189] The purpose of such joint interpretive instruments is to bind the parties to an agreement to a specific interpretation that they collectively agree on regarding certain provisions of the agreement. This mechanism allows both parties to reassert control over an existing agreement between them, as they act together to ensure that any tribunal or court interpreting the agreement will do so in accordance with the parties' mutual intent.[190] The legal mechanism that serves as the basis of this idea is Art. 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT).[191] The article requires interpreters of a treaty

[187] CETA, *supra* note 16, Art. 8.31, para. 2.
[188] Eleni Methymaki & Antonios Tzanakopoulos, *Masters of Puppets? Reassertion of Control through Joint Investment Treaty Interpretation*, REASSERTION OF CONTROL OVER THE INVESTMENT TREATY REGIME , 155–181, 163 (2016) [hereinafter: *Masters of Puppets? Reassertion of Control Through Joint Investment Treaty Interpretation*]
[189] ACIA, art. 40(3); CAFTA-DR, art. 10.22(3).
[190] Masters of Puppets? Reassertion of Control Through Joint Investment Treaty Interpretation , *supra note 193* , page 158.
[191] Id., page 160.

to take into account any subsequent agreement between the treaty parties regarding the interpretation of the treaty or the application of its provisions.[192] A joint interpretation mechanism is an effective way for parties to express their collective intention when an interpretive dispute arises. Furthermore, the mechanism clarifies the intentions of the state parties and increases certainty, therefore benefitting the investors as well.

In order for third countries to provide adequate protection to their investors in EU Member States, we recommend implementing a joint interpretive note, following the model of the 2001 NAFTA Notes of Interpretation of Certain Chapter 11 Provisions. The NAFTA 2001 note clarifies the meaning of certain provisions of the agreement regarding the confidentiality and access to documents and the minimum standard of treatment of aliens. The note is short and thorough, reaffirming the meaning of specific articles in order to ensure that those provisions will be interpreted in the unanimous manner agreed upon by the parties in all future disputes. The note was signed by representatives of all three parties to the agreement and is now an inseparable part of NAFTA.[193]

A main advantage of joint interpretive instruments is based on the distinction between an interpretative note and an amendment. An interpretative note clarifies the meaning of the original text, therefore, its effect reaches back to the entry into force of the agreement.[194] This retroactive application means that the provided interpretation will be applied to all investors covered under the treaty from the date of its entry into force. This is different from the case of an amendment in which the changes will only apply to investors who began investing after the date of the amendment.[195] In addition, joint interpretations can be issued at any time and can be a simpler and faster mechanism than renegotiating or amending existing agreements. They may also allow governments to address unwanted interpretations that could otherwise lead governments to consider terminating treaties. For example, by implementing a joint interpretive note stating that

[192] *The legal framework applicable to joint interpretive agreements of investment treaties*, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT , 5 (2016) [hereinafter: *The legal framework applicable to joint interpretive agreements]*
[193] Masters of Puppets? Reassertion of Control Through Joint Investment Treaty Interpretation , *supra note 193 , page* 163-165.
[194] Id., page 166-167.
[195] *The legal framework applicable to joint interpretive agreements, supra* note 197, *page 9*..

EU law and any relevant domestic law should only be considered by a Tribunal as a matter of fact, while clarifying that any meaning given to domestic or EU law by an arbitral Tribunal shall not bind other courts or authorities of the Member State party, similar to the guidelines provided in Art. 8.31 of CETA, the contracting parties to an agreement can significantly reduce the possibility of incompliance with EU law.

Nonetheless, it is important to acknowledge the possible argument that during the process in which a tribunal considers if EU law was the cause for a breach of any of the agreement's provisions, it may indirectly interpret EU law. For instance, Art. 8.31, para. 2 of CETA acknowledges this possibility as it implies that the CETA Tribunal may give "meaning" to domestic law.[196] This can also be inferred from Art. 8.28, para. 2 of CETA which provides that the CETA appellate body can reverse a Tribunal's award based on "manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law".[197] It is difficult to overlook the possibility that such "appreciation" of EU law may result in its interpretation, essentially infringing on the autonomy of EU law. In order to avoid such incompatibilities with EU law as described above, we recommend implementing similar wording to that provided in Art. 8.31, para. 2 of CETA which restricts that **"the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party".** Moreover, Art. 8.31 goes on to ensure that **"any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party"**.[198] Such specific wording reduces the possibility of undesired interpretation of EU law by an arbitral Tribunal and therefore reduces the chance of incompatibilities with Art. 344 TFEU. This technicality was addressed in Opinion 1/17 as one of the main reasons the settlement of disputes under CETA is not incompatible with EU law as opposed to the case discussed in *Achmea*.[199]

One last point of importance to this issue is the ideal definition of the wording "the courts or authorities of that Party" stated in Art. 8.31, para. 2.[200] Such a broad and unspecific wording allows

[196] CETA, *supra* note 16, Art. 8.31, para. 2.
[197] Id., Art. 8.28, para. 2.
[198] CETA, *supra* note 16, Art. 8.31, para. 2.
[199] Opinion 1/17, *supra* note 1, para. 110.
[200] CETA, *supra* note 16, Art. 8.31, para. 2.

the tribunal to choose between "prevailing interpretation given to the domestic law" by the CJEU, EU General Court, or national courts.[201] The term "authorities" may even be wide enough to include the prevailing interpretations of non-judicial authorities such as the European Commission or national governments of Member States. **It can be argued that by allowing the CETA Tribunal to *choose* its desired interpretation of EU law, it will *de facto* interpret it.** Our suggested solution in order to avoid this indirect interpretation relies on the explicit usage of the term "*prevailing*". As the term usually presents the most common, widespread and dominant interpretation, the guiding principle here will be to establish that the prevailing interpretation the Tribunal is basing its ruling on is indeed the "prevailing" one. For instance, regarding matters which the CJEU had already expressed its opinion on, the CJEU's opinion should prevail over all others. In cases where there isn't a formal interpretation of a high court, it may be possible to turn to interpretations made by lower courts as well as the European Commission and other executive authorities, as long as it is clearly proven that those interpretations are indeed the "prevailing", widespread, and most agreed upon ones regarding the matter.

5.3 Determining a Seat of Arbitration Outside of the EU Legal System

While the selection of the seat of arbitration might seem as a secondary issue in the dispute settlement process, it may in fact have a significant impact on the arbitration proceedings, and in particular, on determining the law applicable to the dispute. The reason for this is that the applicable law will also include the law of the seat of arbitration, that being the law of the country where the arbitration takes place – *lex arbitri*.[202] Under the New York Convention, the parties to a dispute settled by arbitration are given complete freedom to choose the seat of arbitration. The parties to a dispute typically base their choice on various factors such as the enforceability of the rendered award, the risk of long and costly appeals, and the Tribunal's neutrality. Particularly in the case of investment arbitration, parties may choose a specific seat of arbitration in order to isolate the disputes from the influence of certain geo-political organizations, such as the EU.[203]

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[201] *Opinion 1/17 in Light of Achmea: Chronicle of an Opinion Foretold?*, *supra* note 65.
[202] Robert Porubsky, Ondrej Ponistiak , *The Importance of the Seat of Arbitration in the European Context*, CZECH YEARBOOK OF INTERNATIONAL LAW, p.239, available at: http://www.bpv-bp.com/download/publications/clanek_opo_rpo_010416.pdf [hereinafter: *The Importance of the Seat of Arbitration in the European Context]*.
[203] Id.

In the *Achmea* decision, the seat of arbitration was Germany, therefore EU law was also applicable as the domestic law in the seat of arbitration. In light of that, it may be possible that determining a seat of arbitration that is located outside of the EU may assist a third country investor in two aspects. First, it may reduce the risk of possible participation of bodies such as the European Commission in the dispute. Second, it may be possible that courts located outside the EU will be less likely to take into consideration the ruling of the CJEU in *Achmea* and other relevant developments in EU law.[204] Therefore, it is suggested that **third countries may limit the possibility of *Achmea* applicability, in order to avoid potential non-compliance with EU law, by choosing a seat of arbitration outside of the EU.** In the *Eureko v. Slovakia* case, the European Commission stated that it is "firmly opposed to the 'outsourcing' of disputes involving EU law" to tribunals outside the EU courts.[205] It is important to note that the CJEU in its *Achmea* decision did not distinguish between arbitral Tribunals seated in the EU and arbitral Tribunals seated outside the EU. If this distinction was to be addressed by the Court, it may potentially lead to a different conclusion. However, tribunals, in proceedings seated in EU jurisdictions, might be more inclined to consider the application of EU law, including decisions of the CJEU, if the tribunal considers itself bound to render an award that is aligned with the public policy of the seat of arbitration. This idea might be of distinct relevance to non-ICSID awards, since one of the unique features of ICSID arbitration is that proceedings are largely detached from a national legal order. In contrast, in proceedings under the UNCITRAL or SCC arbitration rules, the legal seat of the arbitration determines the place and availability of review of decisions and awards.[206]

If the arbitral seat is located outside the EU, or the arbitration is conducted on the basis of the ICSID Convention and if sufficient assets of the defending Member State (for enforcement of the award) are located outside the EU, no Member State court can gain jurisdiction of the arbitral award. In such situations, it might be tempting for the Tribunal to defy the CJEU's ruling as one

[204] Id.
[205] *Eureko BV v Slovakia*, Award on Jurisdiction, Arbitrability and Suspension, PCA Case No 2008-13, IIC 463 (2010), 26th October 2010, Permanent Court of Arbitration, para. 184.
[206] INVESTOR-STATE DISPUTE SETTLEMENT, UNCTAD Series on Issues in International Investment Agreements II, May 2014, p.74, *available a*t: https://unctad.org/en/PublicationsLibrary/diaeia2013d2_en.pdf.

of a domestic court which cannot trump public international law. If this indeed happens, it will be interesting to see how domestic courts outside the EU would deal with such situations.[207]

5.4 The Status of Sunset Provisions

In the event that Member States seek to terminate or renegotiate existing agreements with third countries in order to eliminate provisions that raise questions of compatibility with EU law, sunset provisions, also known as grandfather clauses, may come into play. Sunset provisions are included in IIAs with the purpose of protecting investments made prior to the termination of an agreement or a certain provision of an agreement in question for a certain period. The provisions' effect varies, usually stretching for the timespan of an additional 10-20 years post termination.[208] The rationale of sunset clauses is to protect the legal expectations of investors, whose investments were made based inter alia on the existence of the respective IIAs.[209] The 2020 Termination Agreement addresses the validity of such sunset provisions, stating that all sunset clauses contained in the intra-EU BITs terminated "shall not produce legal effects".[210] Therefore, this mechanism will not have an effect in intra-EU context since the termination is mutual. However, in the case of extra-EU BITs, the termination is unilateral and done by the EU Member State only. Therefore, sunset provisions may be able to provide a certain level of protection for current investors in the event of termination or renegotiation of the agreement.[211]

Another indication that sunset clauses may in fact be able to provide a certain level of protection to foreign investors investing in the EU prior to termination or amendment of the IIAs, is the fact that Regulation 1219/2012, which clarifies that existing extra-EU IIAs will stay in force until replaced by new agreements between the EU and the relevant third countries, does not address the

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[207] *The Limited Immediate Effects of CJEU's Achmea Judgement*, *supra* note 177.
[208] Tania Voon & Andrew D. Mitchell, *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law*, 31 ICSID REVIEW, 413–433, 432 (2016) [hereinafter: , *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law]*
[209] Lavranos, Nikos, *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:* http://arbitrationblog.kluwerarbitration.com/2019/12/01/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/?print=print.
[210] *Termination Agreement*, Art. 2-3.
[211] *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law*, *supra* note 213, page 427.

status of sunset clauses. Regulation 1219/2012 confirms that extra-EU BITs will be terminated in the event that a new agreement comes into force between the EU and the relevant third country or if it constitutes an obstacle to potential negotiations between the EU and the relevant third country. Yet, the regulation does not address the status and effect of sunset clauses in those agreements, and is silent regarding whether they will continue to provide protection for investors under the terms of the terminated BIT.[212] On that note, it seems likely that in the event the current extra-EU IIA is replaced by a new agreement between the parties, or between the EU and the relevant third country, particularly if the agreement includes a clause of succession whereby the rights under the previous IIA are finally and definitely terminated and replaced by the IIA, the effect of the previous agreement's sunset clause will be very limited. However, as it may take time for the EU to replace all existing extra-EU BITs with agreements to which the EU as a whole is a contracting party, sunset clauses may be essential in providing a certain level of protection in the meantime.

While sunset provisions will not completely prevent the application of *Achmea* to existing BITs with EU Member States, they may guarantee that existing investments will not be harmed if the *Achmea* ruling is made formally applicable to extra-EU BITs, leading to the termination of extra-EU arbitration clauses or extra-EU agreements as a whole. Additionally, the utilization of sunset clauses brings us again to the question of reciprocity, as the EU is likely to be concerned with the protection available for its own investors investing under extra-EU IIAs.

5.5 Negotiating an IIA with the EU as a Whole

If an agreement is negotiated with the EU itself, the EU's ratification provides the agreement with higher legitimacy in terms of its compatibility with EU law.[213] Furthermore, if an arbitration clause is included, the EU's ratification of the agreement formally provides its consent to the submission of all disputes between the EU itself and its Member States to international arbitration.

[212] James H Carter, THE INTERNATIONAL ARBITRATION REVIEW, 8th edition, July 2017.
[213]Carola Glinski, *Achmea and its Implications for Investor Dispute Settlement*, SSRN ELECTRONIC JOURNAL, 18-19 (2018)

The immunity of IIAs negotiated with the EU as a whole to the implications of *Achmea* can be learned from the 2020 Termination Agreement as well as from the findings in Opinion 1/17. First, the Termination Agreement explicitly states that the obligation of the Member States to terminate all intra-EU agreements will apply only to pure intra-EU BITs and not to MITs such as the ECT, which the EU itself is a party to.[214] Second, in Opinion 1/17, an Arbitral Tribunal constituted by an agreement between the EU and Canada, a third country, was deemed to be valid and compatible with EU law. While the validity of the CETA Tribunal may also be influenced by it being a permanent body rather than a typical ad-hoc ISDS tribunal, the findings in Opinion 1/17 strengthen the claim that agreements between third countries and the EU are not immediately affected by the *Achmea* precedent. Additionally, it is important to keep in mind the EU's agenda regarding the creation of a multilateral alternative for the settlement of international investment disputes.[215]

At the center of the EU's efforts is its call for the establishment of a standing Multilateral Investment Court (MIC) which will increase predictability and consistency and improve other elements in the current ISDS system.[216] Ultimately, the EU's intention is for the MIC to replace the existing ISDS mechanisms in all EU agreements with third countries.[217] In line with the EU's criticism of the existing ISDS system and its aspirations to create a permanent multilateral alternative, as well as the CJEU's recent findings regarding the incompatibility of arbitral tribunals created under BITs, transitioning to dispute settlement methods between third countries and the EU as a whole instead of its individual Member States may increase the legitimacy of investment dispute resolution in the eyes of the EU. The EU has put an effort into concluding several IIAs with third countries in recent years, prior to as well as post *Achmea*, as listed in the diagram below.

[214] *Termination Agreement.*
[215] Submission of the European Union and Its Member States to UNCITRAL Working Group III, "Establishing a Standing Mechanism for the Settlement of International Investment Disputes," European Commission, 18 January 2019, *available at:* http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf.
[216] Speech by European Commissioner for Trade Cecilia Malmström, "A Multilateral Investment Court: A Contribution to the Conversation about Reform of Investment Dispute Settlement," European Commission. Brussels, November 22, 2018.
[217] "Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiation," European Commission – Trade, 16 September 2015, *available at:* http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364.

Figure 12: Investment related agreements concluded by the EU prior to *Achmea* (from 2013 until 2018)

Title	Date of Signature
Armenia - EU CEPA (2017)	24/11/2017
Canada - EU CETA (2016)	30/10/2016
EU - Kazakhstan EPCA (2015)	21/12/2015
EU - Ukraine Association Agreement (2014)	27/06/2014
EU - Georgia Association Agreement (2014)	27/06/2014
EU - Moldova Association Agreement (2014)	27/06/2014

Figure 13: Investment related agreements concluded by the EU post-*Achmea* (from March 2018 until today)

Title	Date of Signature
EU - Viet Nam Investment Protection Agreement (2019)	30/06/2019
EU - Singapore Investment Protection Agreement (2018)	15/10/2018
EU - Japan Economic Partnership Agreement (2018)	17/07/2018

Furthermore, in *Achmea*, the CJEU stated that non-compliance with EU law arises specifically when the dispute settlement mechanism involves "an arbitral tribunal such as that referred to in Art. 8 of the [Czechoslovakia-Netherlands] BIT".[218] An arbitral tribunal such as that is certainly one set up between two states. One can stretch this conclusion even further and define such arbitral tribunals as specifically ones set up between two EU Member States, limiting the definition to

[218] *Achmea*, supra note 15, para. 43.

include only intra-EU disputes.[219] Nonetheless, in the event that *Achmea* is interpreted to include extra-EU agreements between two states as well, **the definition in para. 43 of the *Achmea* decision quoted above by no means includes arbitral tribunals set up by the EU itself and a non-EU party.** Evidently, in Opinion 1/17, the CETA Tribunal, an arbitral tribunal set up by the EU and a third country, as opposed to one set up by an agreement between an EU Member State and another party, was deemed to be outside the scope of the *Achmea* ruling, while subject to the same principles.[220]

In para. 57 of the *Achmea* decision, the CJEU recalls that "it is true that, according to settled case-law of the Court, an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law". The court goes on to emphasize that the power to establish such an agreement is reserved to the EU, stating that "the competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions".[221] Therefore, while an arbitral Tribunal set up by an agreement concluded by an EU Member State may have been found to be incompatible with EU law in *Achmea,* a Tribunal set up and consented to by the EU itself may be able to overcome this obstacle.

[219] *Opinion 1/17 in Light of Achmea: Chronicle of an Opinion Foretold?*, *supra* note 65, page 111.
[220] Id., page 112.
[221] *Achmea*, *supra* note 15, para. 57.

6 Conclusion

In this memorandum, we endeavoured to clarify the status of extra-EU IIAs following recent developments in EU law, and advise non-EU Member States on how to continue providing protection to investors in EU Member States. This has been done by analysing the implications of CJEU jurisprudence in recent cases concerning the compatibility of intra-EU IIAs with EU law on extra-EU IIAs, mapping the potential implications and the repercussions that may be utilized to overcome them.

In **Chapter 2**, our analysis began with an overview of recent developments in EU law and CJEU jurisprudence, and of the political challenges between the EU, ISDS mechanisms and EU Member States. The chapter lays out significant developments, beginning with the Lisbon Treaty, the CJEU's ruling in the 2018 *Slovak Republic v. Achmea* case, the 2019 Opinion 1/17, the 2015 Opinion 2/15, and the 2020 Termination Agreement.

Although none of the above contain specific references to extra-EU IIAs, in **Chapter 3** we attempt to answer the question regarding whether, and how, these recent developments in EU law could affect extra-EU IIAs. Through a thorough reading of the recent CJEU rulings, we discovered a number of indications that extra-EU IIAs could be impacted. First, Opinion 2/15 narrows EU Members States ability to create and terminate investment agreements with non-EU member countries, and limits EU Member States' competence to create ISDS mechanisms. Opinion 2/17 created a standard of independence for dispute settlement mechanisms that limits arbitral tribunals' interpretation of EU law to "as a matter of fact". In addition, the vague wording used in *Achmea* may allow extra-EU IIAs to be included in the ruling as precluded by EU law. Furthermore, the frequent jurisdictional objections raised by the EU and its Member States express the EU's disapproval of the application of EU law by arbitral tribunals. Finally, the subject of applicable law in an extra-EU IIA could exacerbate the tension between the EU, EU Member States and arbitral tribunals by necessitating EU States to choose between their obligations to IIAs and to the EU.

In **Chapter 4**, after concluding that the *Achmea* decision may, at least indirectly, have some effects on extra-EU IIAs, the paper lists and explains the possible implications to extra-EU IIAs. One central way in which extra-EU IIAs could be affected is by the current atmosphere of uncertainty

regarding the future of extra-EU IIAs, including challenges in future negotiations of extra-EU IIAs due to compatibility issues between EU law and arbitration clauses in IIAs, an increase in the frequency of jurisdictional objections raised by respondent EU Member States in an investment arbitration tribunal, and issues of enforceability of awards in EU Member States.

If the *Achmea* decision and aforementioned developments in CJEU jurisprudence are formally applied to extra-EU IIAs, the paper presents possible implications, including the lack of investment protection for EU investors in non-EU Member States and a shift in bargaining power between the EU and non-EU Member States attempting to negotiate investment agreements.

Finally, in **Chapter 5**, the paper discusses how non-EU Member States can best protect their investors currently investing in EU Member States, in light of the issues of applicability and implications in the chapters above. In this chapter, we determine what mechanisms may be utilized by non-EU Member States to best protect their investors. This includes:

1. Limiting the applicability of EU law in the event of a dispute by mindful wording of the applicable law clause, or binding arbitral tribunals to specific interpretations agreed upon by contracting parties in joint interpretive instruments, in order to prevent incompatibilities with EU law in intra-EU IIAs ;
2. Isolating disputes from EU law by choosing the seat of arbitration located outside of the EU legal system, thereby reducing the risk of potential infringements of the autonomy of EU law by isolating disputes from the influence of the EU;
3. Utilizing the ability of sunset provisions in extra-EU IIAs to protect investments, which could protect the legal expectations of investors in the event of termination or renegotiation of the agreement;
4. The possible benefits of negotiating future investment agreements with the EU as a party, in order to provide the agreement with higher legitimacy in the eyes of EU law.

In conclusion, we believe that the atmosphere of political turmoil in the EU and amongst EU Member States, as well as the flexible wording of recent CJEU rulings, may lead to the application of recent developments in CJEU jurisprudence to extra-EU agreements. Following this rationale, extra-EU IIAs may suffer the implications of termination of extra-EU IIAs, jurisdictional arguments for the preclusion of IIAs by EU law and unenforceability of awards, or at the least

experience the results of the current climate of uncertainty regarding the future of investment agreements in the EU. In this vein, we believe that by utilizing the suggestions in chapter 5, non-EU Member States will be able to continue to provide protection to their investors, particularly from the potential implications of such recent development.

Annex - The Special Case of the ECT

There has been much speculation over the applicability of the *Achmea* decision's findings, regarding the compatibility of arbitral tribunals with EU law, to multilateral investment treaties ("MITs") to which EU Member States are a party. In this addendum, we will discuss the status of the Energy Charter Treaty ("ECT") following recent developments in EU law, and attempt to reach general conclusions regarding the effects of the application of the *Achmea* decision to MITs in general, in intra-EU and extra-EU contexts.

1. The Status of the ECT Following Developments in EU Law and CJEU Jurisprudence

As the issue of the *Achmea* decision's applicability to MITs was subject to much speculation following the *Achmea* ruling, in July 2018, the EU Commission issued a non-binding communique, which addressed the CJEU's March, 2018 *Achmea* decision's applicability to the ECT. The communique, which was supported by 21 EU Member States, stated that the *Achmea* ruling, which formally announced all intra-EU IIAs are incompatible with EU law, also applies to intra-EU disputes under MITs, such as the ECT.[222] Further clarification was provided by the EU and EU Member States on May 5, 2020, following the issuing of the Agreement for the Termination of Bilateral Investment Treaties between the EU Member States ("Termination Agreement"). The Agreement set out the European Commission's opinion that intra-EU BITs are indeed incompatible with EU law and should be terminated immediately, with the exception of arbitration proceedings under the ECT, that for the time being, should be left untouched.[223]

1.1 Could the Achmea Ruling Apply to the ECT?

In its preamble, the Termination Agreement states that the agreement **"does not cover intra-EU proceedings on the basis of Article 26 of the Energy Charter Treaty. The European Union**

[222] Norton Rose Fulbright - international arbitration report - issue 12 – p.30
[223] EU Member States agree on a plurilateral treaty to terminate bilateral investment treaties, ec.europa, 24/10/19, https://ec.europa.eu/info/publications/191024-bilateral-investment-treaties_en

and its Member States will deal with this matter at a later stage".[224] The final sentence of the quote hints at the Member States signatories' willingness to discuss whether the ECT should be subject to the same resolutions as intra-EU BITs as set out in the Termination Agreement. Further indication of potential application of the *Achmea* ruling to the ECT can be learned from the European Commission's non-binding communique regarding the *Achmea* decision's relevance to the ECT, mentioned above.[225] While following the communique, only five EU Member states have declared that as they see it, the *Achmea* ruling is silent on MITs and therefore inapplicable to the ECT, 21 other EU Member States have supported the Commission's position that intra-EU proceedings under the ECT should be minimized as much as possible. In addition, as the supremacy of EU law, as outlined in *Achmea* and the Termination Agreement, requires Member States to terminate all investment agreements incompatible with EU law, it is possible to conclude that Member States are not only required to terminate intra-EU IIAs, but also avoid the application of MITs including an arbitration clause, such as the ECT, at least in intra-EU context.[226] From a technical standpoint, as investors from the EU are able to bring claims under the ECT against other EU Member States, it seems that a situation such as this is no different than arbitral proceedings launched under intra-EU BITs. Seeing as both situations include an EU investor as the claimant, and an EU Member State as the respondent, it may in fact be possible that intra-EU arbitration under the ECT falls under the scope of the *Achmea* ruling. Particularly, seeing as in both situations, an arbitral tribunal may inevitably be required to interpret and apply EU law.

There have been several examples of *Achmea* related arguments against arbitral tribunals jurisdiction in intra-EU disputes under the ECT. In the 2012 *Vattenfall v. Germany* case, Germany and the European commission argued that EU law was nevertheless applicable to the IIA, and therefore the *Achmea* ruling needed to be taken into account during the jurisdictional stage of the proceedings. Following the *Vattenfall* case, the conflict between the ECT and EU law post-*Achmea* still remains a common topic of conversation. In the February, 2018 case of *Novenergia v. Spain*, the arbitral tribunal concluded that "**its jurisdiction exclusively derives from the ECT and that**

[224] *Termination Agreement*, *supra* note 88.https://ec.europa.eu/info/files/200505-bilateral-investment-treaties-agreement_en
[225] Norton Rose Fulbright - I*nternational Arbitration Report* - issue 12 – p.30.
[226] *It Is not Just About Investor-State Arbitration: A Look at Case C-284/16, Achmea BV*, p.370.

no conflict between EU law and the ECT has proven to exist, the tribunal needs not to determine the hierarchy between the ECT and EU law as this issue becomes redundant"[227].[228]

1.2 Counterarguments: Why the Achmea Ruling will not Affect the ECT

1.2.1 Normative Superiority of ECT or EU Law?

As the EU is a signatory and a Contracting Party to the ECT, it has been argued in the past that the ECT forms part of EU law itself, and therefore the supremacy of EU law cannot be established in this context.[229] In other words, by signing the ECT, the EU has given its consent to the submission of disputes to investment arbitration under Article 26(3)(a) ECT. In doing so, it has also ratified the consent given by the individual Member States that are signatories to the treaty.[230] From this standpoint, the ECT does not constitute an infringement on the autonomy of EU law as described by the CJEU in its recent *Achmea* decision. Another way to side-step the issue of the *Achmea* decision's applicability can be seen in the *Vattenfall* case, in which the Tribunal ruled that EU law does not constitute part of international law used to derive meaning from Art. 26 ECT. The tribunal therefore concluded that even if EU law was to be found applicable to the tribunal's jurisdiction, **"no persuasive case has been made out for applying it so as to yield an interpretation of Art. 26 ECT that departs so radically from the ordinary meaning of the terms of that article as to exclude intra-EU disputes from the scope of Article 26"**.[231] More evidence supporting this may be inferred from the findings stated in Opinion 1/17, in which the settlement of disputes under CETA, an agreement between the EU and Canada, was declared to be unaffected by the *Achmea* ruling. Although there is a significant distinction between CETA and the ECT, as dispute

[227] *Novenergia II - Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Case No. 063/2015, 15 February 2018, [hereinafter: *Novenergia II v. Kingdom of Spain*], para. 463.
[228]This issue remains in question, as Spain asked other national courts to provide a preliminary ruling on the ECT's compatibility with the EU law from the CJEU. Such a decision would provide great clarity on the CJEU's position on the ECT and other multilateral treaties. Additionally, the US District Court of the District of Columbia is currently reviewing Spain's motion to resist enforcement of the award based on the *Achmea* decision. Schwedt, Kristin and Ingwersen, Hannes, *Intra-EU ECT Claims Post-Achmea: Vattenfall Decision Paves the Way*, 13 December 2018, available at http://arbitrationblog.kluwerarbitration.com/2018/12/13/intra-eu-ect-claims-post-achmea-vattenfall-decision-paves-the-way/.
[229] Achmea and its Implications for Investor Dispute Settlement, p.18-19
[230] Deutsches Aktieninstitut – p.3
[231] *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, 6 December 2016, [hereinafter: *Vattenfall AB v. Federal Republic of Germany*], para. 167.

settlement under CETA is done by a permanent dispute settlement body, it can be argued that the similar to CETA, which was signed and consented to by the EU as a party, the ECT enjoys higher legitimacy than other agreements in terms of its compatibility with EU law, and as a result will not be affected by the ruling in *Achmea*.[232]

It should be noted that despite the numerous claims made by the Commission denying tribunals' jurisdiction in intra-EU cases under the ECT,[233] tribunals have often successfully upheld their jurisdiction. Furthermore, tribunals seated outside EU Member States can possibly have an easier time upholding jurisdiction post-*Achmea*, as they may not consider themselves bound by EU law. This is likely to be the case until clarification is provided on the matter by the CJEU or the European Commission.

1.2.2 The Intent of the Silence in Achmea regarding the ECT

It has been suggested that the *Achmea* ruling's silence on its applicability to MITs such as the ECT is demonstrative that the ruling has no effect on intra-EU arbitration proceedings initiated under the ECT.[234] This suggestion is also based on the assumption that if the *Achmea* ruling was directly applicable to the ECT, the communique would not be necessary in order to provide formal clarification.

2. The Effects the Application of the Achmea Ruling to the ECT Could Have on Intra-EU IIAs

If the July 2018 non-binding communique issued by the European Commission becomes formally binding, or in the case that the recent Termination Agreement is extended somehow in the future to include the ECT, those two scenarios may provide the "persuasive case" required by the

[232] *Achmea and its Implications for Investor Dispute Settlement*, p.18-19.
[233] *Novenergia II v. Kingdom of Spain, supra* note 228; *Vattenfall AB v. Federal Republic of Germany, supra* note 232; Electrabel S.A. v. Republic of Hungary ICSID Case No. ARB/07/19. Decision on Jurisdiction, Applicable Law and
Liability, 30 November 2012, [hereinafter: *Electrabel S.A. v. Republic of Hungary*].
[234] Norton Rose Fulbright - international arbitration report - issue 12 – p.30

Vattenfall tribunal to back the exclusion of intra-EU disputes from the scope of Art. 26 ECT. In such a case, the Member States will be required to cease all arbitration proceedings and the execution of awards under the ECT as far as intra-EU relations are concerned.[235] The debate regarding whether the *Achmea* ruling should be applicable to MITs in an intra-EU context is essentially a question of whether there is a need for the interpretation of EU law as part of the settlement of disputes under MITs such as the ECT.

2.2 EU Liability as a Contracting Party to the ECT

It can be argued that one must distinguish between the EU's consent to the substantive law of the treaty and its consent to the submission of all disputes to international arbitration. While the EU is a party to the ECT, it is unclear whether an investor can bring a claim against the EU itself as a legal personality for the actions of a Member State. This issue raises three significant questions. First, what is the extent of the EU's liability to its Member States' actions? The EU has the status of a Regional Economic Integration Organization (REIO) as a contracting party to the ECT. Article 1(3) ECT defines the REIO status as meaning "**an organization constituted by states to which they have transferred competence over certain matters a number of which are governed by this Treaty, including the authority to take decisions binding on them in respect of those matters**".[236] In the *Electrabel v. Hungary* case, the Tribunal acknowledged that EU Member States are bound by certain decisions of the EU which may conflict with the ECT. However, the Tribunal declined to attribute liability to the EU claiming that the claim is not concerned with the decision of the EU, but with the manner in which Hungary implemented the EU's decision .[237] The second question regarding the matter is in regard to whether arbitral awards rendered against the EU can be enforced? In the event that an arbitral tribunal finds actions of a Member State attributable to the EU and allows an investor to bring ECT-claims against the EU, difficulties may arise when attempting to enforce any rendered awards. The reason for this is that the EU is not and cannot become a party to the ICSID Convention, as Art. 67 ICSID restricts membership exclusively to states.[238] Accordingly, the main platform for disputes including the EU as a respondent would be

[235] *Achmea and its Implications for Investor Dispute Settlement*, p.18-19.
[236] Article 1(3) ECT.
[237] *Electrabel S.A. v. Republic of Hungary*, *supra* note 234, para. 6.72.
[238] Art. 67 ICSID

the UNCITRAL Arbitration Rules or the Stockholm Chamber of Commerce, as alternatively provided for under Art. 26(4) ECT.[239] The third and last question is whether ECT-based claims can be brought by investors within the EU? While third country investors may find alternative ways to utilize this approach and bring ECT-based claims against the EU for its Member States' actions, the option may not be available for EU investors, because they cannot be considered an investor "of another contracting party" within the territory of the EU, as required by Art. 26 ECT. Therefore, an EU investor in such a scenario lacks "diversity of territory", as the EU is regarded as "one legal place".[240]

3. The Effects the Application of Achmea to the ECT Could Have on Extra-EU IIAs

While neither the termination agreement nor the communique addresses extra-EU IIAs specifically, it is important to note that many non-EU Member States are parties to the ECT, which contains intra-EU elements in itself. If the termination agreement is stretched to include the ECT, or if Member States adhere to the communique and avoid applying the ECT's arbitration clause, at least in an intra-EU context, doubts could be raised over the admissibility of extra-EU disputes (based on the ECT or otherwise), and sides to a dispute could rely on this as basis for a jurisdictional argument against arbitral tribunals.[241]

3.1 Jurisdictional Advantage for non-EU Member States

If the Member States establish that the ECT's arbitration clause does not apply intra-EU, or the *Achmea* ruling is officially applied to the ECT, problems of discrimination may arise between EU investors and non-EU investors in regards to their ability to bring a claim under the ECT to arbitration against an EU Member State. While a non-EU Member State investor has the ability to bring a claim to an arbitral tribunal, an EU investor will only be able to take legal action against

[239] Art. 26(4) ECT.
[240] *Electrabel S.A. v. Republic of Hungary, supra* note 234, para. 5.20.
[241] 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, Nikos Lavranos, Kluwer Arbitration Blog, 01/12/19, http://arbitrationblog.kluwerarbitration.com/2019/12/01/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/

that same EU Member State under the EU legal system. Investors from outside the EU can take advantage of the arbitration clause and bring the same disputes against those same EU Member States to the attention of arbitral tribunals.

3.2 Enforcement Related Problems

Even in the event that an EU Member State, as a respondent to a claim, accepts the arbitral Tribunal's jurisdiction, non-EU investors may still be faced with potential unenforceability of the awards rendered by the tribunal, as EU Member States may refuse to comply on the grounds that the award itself is incompatible with EU law. A way to overcome this may be through the argument that the EU itself is a signatory to the ECT, and is therefore bound by the treaty to comply with arbitral proceedings and the awards rendered. However, until such arguments are raised in front of an arbitral tribunal, it is difficult to predict what would be the outcome of such a situation and whether arbitral awards can be effectively enforced.

3.3 EU Liability for Member States

As explained in section 2.1, if Member States withdraw from the ECT, and the EU's membership to the treaty is sufficient to cover all claims against EU Member States, non-EU Member States will still have the ability to launch arbitration proceedings against the EU for violations of the treaty by any of the EU Member States. However, there is room for discussion regarding whether the EU can be held liable for actions taken by individual Member States. For instance, in the scenario that a Member State ratifies a law that indirectly causes for the expropriation of an investment made by a non-EU investor, can that investor bring arbitration proceedings against the EU for domestic legal action taken by an individual Member State? Until such a claim is brought in front of an arbitral tribunal, it is difficult to predict how tribunals would approach such a situation.