ARTICLES
SPECIAL SECTION – THE *ACHMEA* CASE
BETWEEN INTERNATIONAL LAW AND EUROPEAN UNION LAW
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I WOULD RATHER BE A RESPONDENT STATE BEFORE A DOMESTIC COURT IN THE EU THAN BEFORE AN INTERNATIONAL INVESTMENT TRIBUNAL

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ABSTRACT: In its landmark judgment in the case of *Achmea* (judgment of 6 March 2018, case C-284/16 [GC]), the Court of Justice adjudicated that Investor-State Dispute Settlement (ISDS) adversely affects the autonomy of EU law. Accordingly, ISDS clauses in international investment agreements that contravene Arts 267 and 344 TFEU and the principles of mutual trust and sincere cooperation enshrined in Arts. 19, para. 1, and 4, para. 3, TEU are inapplicable under EU law. However, the reasoning of the Court of Justice in *Achmea* did not convince international investment tribunals that they lack jurisdiction in intra-EU investment disputes. This opposition calls for clarification of the different principles underpinning the EU legal order and international investment law. This *Article* presents a debate between these two legal orders, which unfolds around three separate, albeit related issues: the status and applicability of the EU and the Member States' international agreements within the EU legal order; the manner in which the *Achmea* judgment must be

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interpreted and its application in the international investment law context; and the meaning and relevance of the concept of the autonomy of EU law as the key issue in defining the relationship between EU law and international investment law.

KEYWORDS: autonomy of the EU legal order – international investment law – Arts 267 and 344 TFEU – mutual trust – compatibility of ISDS with EU law – rule of law.

I. INTRODUCTION

This *Article* is a debate between the EU legal order and international investment law. It is a debate between two legal systems, which share similar foundations but have nonetheless, different objectives and methods of reasoning. These differences have led to mutual tensions, with their full consequences yet to be revealed. In its essence, this debate is a discussion about the validity of the Investor-State Dispute Settlement (ISDS) clauses encapsulated in intra-EU bilateral investment treaties (BITs) and the Energy Charter Treaty (ECT) under EU law. These international investment agreements were concluded between mostly Western EU Member States and the Central and Eastern European States during the 1990s in order to protect Western States' investors in the newly open markets of the former Comecon. At that time they were extra-EU international investment agreements, concluded between EU Member States and third States. From 2004, with the progressive accession of the Central and Eastern European States to the EU, they have become intra-EU BITs. There are still 181 of these agreements in force.[1]

The debate between these two legal orders commenced soon after the main enlargement, around the year 2006, when the European Commission noted "arbitration risks and discriminatory treatment of investors" stemming from intra-EU BITs, whose content has partly been "superseded by Community law upon accession". The Commission thus invited the Member States to review the need for these agreements "in order to avoid legal uncertainties".[2] The debate has intensified since, reaching its climax in March 2018 with the *Achmea* judgment delivered by the Grand Chamber of the CJEU, in which the Court ruled that the ISDS clause in the Netherlands-Slovakia BIT is incompatible with EU law.[3] The consequences of the *Achmea* decision remain controversial and the subject of ever opposing views about its relevance for investment treaty arbitration in the EU.

[1] United Nations Conference on Trade and Development (UNCTAD), *Investment Policy Hub*, investmentpolicyhub.unctad.org. Only two BITs were concluded between "old" Member States: 1961 Germany – Greece BIT and 1980 Germany – Portugal BIT.

[2] Economic and Financial Committee (EFC), 2007 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments of 23 November 2007, ECFIN/CEFCPE(2007)REP/55240, para. 14.

[3] Court of Justice, judgment of 6 March 2018, case C-284/16, *Achmea* [GC].

In broader terms, this is a debate about the autonomy of EU legal order and its relationship with international law in general, and investment law in particular. As presented in this *Article*, the debate will oppose two visions on who should have the authority to adjudicate investment disputes between investors from a EU Member State and another EU Member State. The notion of autonomy is the central issue and at the same time the key misunderstanding of this debate. While EU law claims its autonomy, which cannot be adversely affected by international law, international investment law shows little interest in supporting such vision. Indeed, according to investment lawyers, EU law is embedded in a domestic or a regional context. Accordingly, this legal order is, in any case, subordinated to international law.

In more general terms, lawyers have a propensity to claim the autonomy of their legal orders. As autonomy goes hand in hand with national sovereignty, it comes as no surprise that every sovereign State asserts the autonomy of its law. At this stage, however, the EU has no sovereignty. It is neither a federation nor a confederation, let alone an independent State. Yet, it claims the autonomy of its legal order with respect to both the legal order of its 28 Member States and international law, justifying it by the constitutional structure of the EU and the very nature of EU law, which stems from international law. The autonomy has been defined either as "a normative axiom"[4] or as a "central constitutional principle".[5] Moreover, EU law claims its primacy over domestic laws of its Member States. Such vision however, has not been immediately or unconditionally accepted by legal constituencies of all Member States. Only recently, in Germany and France, the *Bundesverfassungsgericht* (Federal Constitutional Court) and the *Conseil Constitutionnel* respectively, have been referring questions for preliminary rulings to the CJEU.[6] This trend is further exacerbated in dualist legal regimes, shared by several Member States, such as the UK, Italy, and Ireland. More cynical observers would note that this reluctance in accepting the prevalence of EU law over domestic laws of Member States has even resulted in the extreme scenario of Brexit. While most of the Member States have not been that extreme, in reality the authority of EU law over constitutional laws of Member States is tolerated rather than embraced by national constitutional courts.

For pedagogical reasons, this debate espouses a fictional dimension.[7] Two parties argue their case: on the one hand, an imaginary Professor of EU law, Mr Van Gend en Loos, convinced by the soundness of the CJEU case-law regarding the autonomy of the

[4] A. VON BOGDANDY, J. BAST, *Principles of European Constitutional Law*, Oxford: Hart Publishing, 2010, p. 39.

[5] E. PAASIVIRTA, *European Union and Dispute Settlement: Managing Proliferation and Fragmentation*, in M. CREMONA, A. THIES, R.A. WESSEL (eds), *The European Union and International Dispute Settlement*, Oxford: Hart Publishing, 2017, p. 32.

[6] M. BLANQUET, *Le dialogue entre les juges constitutionnels et la Cour de justice: enfin des mots, toujours des maux?*, in B. BERTRAND, F. PICOD, S. ROLAND (dir.), *L'identité du droit de l'Union européenne. Mélanges en l'honneur de Claude Blumann*, Brussels: Bruylant, 2015, p. 288 *et seq*.

[7] Any resemblance to real characters is unintentional and accidental.

EU legal order; on the other, an investment arbitrator, Ms Icsid, considering that EU law cannot ever trump international investment law. How will this debate proceed? Our protagonists will tackle three issues. Firstly, they will introduce the concept of EU autonomy and, through its lenses, discuss the relationship between EU law and international law. In this respect, the status and applicability of international agreements concluded by the EU and the Member States within the EU legal order is examined (section II). Secondly, the debate will continue by focusing on the *Achmea* judgment, which is at the core of controversy between international investment lawyers and EU lawyers. In this regard, in section III the two protagonists disagree on the effects of the *Achmea* judgment on jurisdictional issues in intra-EU disputes. Their debate then moves towards the interpretation of the *Achmea* judgment by various investment tribunals and its impact on international law, with particular focus on the ECT (section IV). As a third and final issue, the debate returns to the autonomy of the EU legal order, at this point explaining its relevance, by focusing on EU relationship with other international courts; European integration more generally; and the enforcement of intra-EU investment awards in more practical terms (section V). For each issue, Professor Van Gend en Loos will attempt to convince Ms Icsid why she should give up her jurisdiction in intra-EU investment disputes whilst she will, as a matter of course, defend her jurisdiction by questioning the relevance of EU law in investment arbitration. The aim of this fictional debate is not to let one protagonist win over the other, but to identify the bones of contention between their two visions.

II. Who trumps who?

II.1. Is EU law autonomous?

Ms Icsid: The relationship between EU law and international investment law is complex and there is room for disagreements, as the debate on this issue has demonstrated so far. However, both the CJEU and investment tribunals agree that EU law is part of international law. For example, the *Electrabel* tribunal noted that "EU law is international law because it is rooted in international treaties",[8] and this has been undisputed by all subsequent investment tribunals.[9] Even the post-*Achmea* tribunals, such as the tribunal in *Vattenfall II*, found that EU law, to the extent of the founding Treaties, should not be ex-

[8] ICSID, decision on jurisdiction, applicable law and liability of 30 November 2012, case no. ARB/07/19, *Electrabel S.A. v. Republic of Hungary*, para. 4.120.

[9] See for example, ICSID, decision on jurisdiction of 6 June 2016, case no. ARB/13/30, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain* (*RREEF v. Spain*), para. 73. To this effect, see the comment of the tribunal in ICSID, decision on the *Achmea* issue of 31 August 2018, case no. ARB/12/12, *Vattenfall AB and others v. Federal Republic of Germany (Vattenfall II)*, para. 146.

cluded from "the purview of international law" under Art. 38, para. 1, let. a), of the Statute of the International Court of Justice.[10] In the same manner, the Court of Justice recalls that EU law is "characterised by the fact that it stems from an independent source of law, the Treaties".[11]

Therefore, if we accept that EU law is part of international law, its Court should not claim that it is an autonomous legal order, which prevails over international law. In effect, the international legal order is a horizontal one. Various international agreements are placed upon equal footing, whereby any conflicts between them must be resolved by the application of general international law treaty conflict rules, which are codified in the Vienna Convention on the Law of Treaties (VCLT). In case of inconsistency between an international investment treaty and EU law, absent the possibility that such inconsistency can be reconciled through interpretation, "unqualified obligation" of any arbitral tribunal constituted under an international investment treaty would be to apply public international law. This applies to all cases, even when it is to the detriment of EU law since "EU law does not and cannot 'trump' public international law".[12] In buttressing the autonomy of the EU legal order, as the CJEU did in *Achmea*, EU law indeed trumps international law.

Professor Van Gend en Loos: The claim that EU law trumps international law is nugatory. At the outset, the EU legal system is an "open system"[13] subordinated to international law, be it *jus cogens* or *jus erga omnes* or *jus dispositivum*.[14] Under Art. 3, para. 5, TEU, the EU is to contribute to the strict observance and the development of international law. In accordance with Art. 21, para. 1, TEU, "the Union's action on the international scene" must be "guided" by "respect for the principles of the United Nations (UN) Charter and international law". Consequently, when it adopts an act, the EU is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the EU.[15]

In addition, any international agreement to which the EU accedes is, by virtue of Art. 216, para. 2, TFEU, binding on the institutions of the EU and its Member States.[16] There-

[10] *Vattenfall II*, cit., paras 145-150.

[11] *Achmea* [GC], cit., para. 33. Regarding the international foundation of the EU legal order, see A. PELLET, *Les fondements juridiques du droit communautaire*, in *Collected Courses of the Academy of European Law*, Leiden: Martinus Nijhff, 1997, p. 219.

[12] *RREEF v. Spain*, cit., para. 87.

[13] P.J.G. KAPTEYN, P. VERLOREN VAN THEMAAT, *Introduction to the Law of the European Communities*, London: Kluwer Law International, 1998, p. 278.

[14] S. ADAM, S. HAMMAMOUN, E. LANNON, J.V. LOUIS, N. NEUWAHL, E. WHITE, *L'Union européenne comme acteur international*, Brussels: Èditions de l'Université de Bruxelles, 2015, p. 82.

[15] See, to this effect, Court of Justice: judgment of 24 November 1992, case C-286/90, *Poulsen and Diva Navigation*, paras 9 and 10; and judgment of 16 June 1998, case C-162/96, *Racke*, paras 45 and 46.

[16] In accordance with Art. 216, para. 2, TFEU, the treaties concluded have primacy over acts of secondary EU law. See, to that effect: Court of Justice, judgment of 3 June 2008, case C-308/06, *Intertanko and Others*, para. 42 and case-law cited. Moreover, measures emanating from bodies which have been established

fore, when exercising its powers, the EU must observe international law. The CJEU is competent to disapply incompatible provisions of an international agreement concluded by the EU in case of their substantive inconsistency with EU law and international rules which are binding on the EU.[17] Last but not least, the CJEU is under an obligation to "take due account" of the wording and purpose of international law, such as UN Security Council (Security Council) resolutions.[18]

Mc Icsid: To my understanding, the EU legal order is only conditionally open towards international law. The CJEU as the supreme guardian of the EU legal order considers EU law as specific international law to which other international law instruments should conform, when necessary to achieve the objectives of the EU founding Treaties. In other words, international law is not deemed to be an autonomous source in the EU legal system. Such approach to international law is always justified by the international character of EU law itself as an autonomous legal order based on the founding Treaties, which cannot be trumped by an international agreement.[19] In that connection, the CJEU has long ago emphasised the contrast between the EU founding Treaties and "ordinary international treaties".[20] The opinion of AG Poiares Maduro in *Kadi* mirrors that interpretation: "In *Van Gend en Loos*, the CJEU considered that the Treaty had established a 'new legal order', beholden to, but distinct from the existing legal order of public international law".[21] I do not see why the EU founding Treaties would be any different from other international treaties, and how could that be an argument to justify EU law's prevalence over international law.

Professor Van Gend en Loos: One has to differentiate between two issues. On the one hand, as a matter of principle, the EU legal order must be consistent with the general principles of international law.[22] On the other hand, the agreements concluded by the EU have become part of the normative hierarchy of that legal order. In effect, in accordance with the Court's settled case-law, international agreements concluded by the EU

by an international agreement concluded by the EU and a third State form part of the EU legal order. See Court of Justice: judgment of 20 September 1990, case C-192/89, *Sevince*, para. 10; judgment of 16 December 1992, case C-237/91, *Kus*; judgment of 28 February 2008, case C-293/06, *Deutsche Shell*, para. 17.

[17] Court of Justice, judgment of 27 February 2018, case C-266/16, *Western Sahara Campaign UK*, paras 45-48. Taking into account that the territory of Western Sahara does not form part of the territory of Morocco under international law, the CJEU reached the conclusion that the EU-Morocco Agreement was not applicable to the waters adjacent to the territory of Western Sahara. See D. SIMON, *Applicabilité des accords entre l'Union européenne et le Royaume du Maroc ou territoires du Sahara occidental: Acte II*, in *Europe*, 2018, p. 6 *et seq*.

[18] Court of Justice, judgment of 16 November 2011, case C-548 /09 P, *Bank Melli*, para. 106.

[19] Court of Justice, judgment of 3 September 2008, joined cases C-402/05 P and C-415/05 P, *Kadi*, paras 281 and 316; *Achmea* [GC], cit., para. 33.

[20] Court of Justice, judgment of 15 July 1964, case 6/64, *Costa v. ENEL*.

[21] Opinion of AG Poiares Maduro delivered on 16 January 2008, case C-402/05 P, *Kadi*, para. 24.

[22] Arts 3, para. 5 and 21, para. 1, TEU.

pursuant to the provisions of the Treaties constitute, as far as the Union is concerned, acts of the institutions of the EU.[23] Accordingly, one has to understand that the international agreements concluded by the EU pursuant to the provisions of the Treaties are, from the date of their entry into force, an integral part of the EU legal order.[24] It follows that the EU legal order is a monist system.[25]

However, it would be wrong to conclude that, once the EU is bound by an international treaty, the CJEU "must bow to that rule with complete acquiescence and apply it unconditionally".[26] Although the Court takes great care to respect the obligations that are incumbent on the EU by virtue of international law, it seeks, first and foremost, to preserve the constitutional framework created by the Treaty. In this connection, the integration of international agreement into the EU legal order may be subject to both an *ex-ante* (Art. 218, para. 11, TFEU) and an *ex-post* review (Arts 263 and 267 TFEU). Whenever international agreements are inconsistent with either founding Treaties provisions or general principles of EU law, they are deemed to be invalid.

With respect to the *ex-post* review, the CJEU has jurisdiction, in the context of both an action for annulment (Art. 263 TFEU) and in a request for a preliminary ruling (Art. 267 TFEU), to assess whether an international agreement concluded by the EU is compatible with the founding Treaties and the constitutional principles stemming from them. In so doing, the Court is empowered to nullify the decision of the Council concluding an international agreement whenever such agreement is incompatible with EU law.[27] Therefore, the CJEU does not have the power to declare an international agreement invalid, but can nullify the decision adopted under EU law concluding the agree-

[23] *Racke*, cit., para. 41; and Court of Justice, judgment of 25 February 2010, case C-386/08, *Brita*, para. 39.

[24] Court of Justice, judgment of 30 April 1974, case 181/73, *Haegeman*, para. 5; judgment of 22 November 2017, case C-224/16, *Aebtri*, para. 50; opinion 1/91 of 14 December 1991, para. 37; judgment of 10 January 2006, case C-344/04, *IATA and ELFAA*, para. 36; and judgment of 21 December 2011, case C-366/10, *ATAA*, para. 73.

[25] S. VAN RAEPENBUSH, *Droit institutionnel de l'Union européenne*, Brussels: Larcier, 2011, p. 486; A. POTTEAU, *Les dimensions constitutionnelles de l'autonomie de l'ordre juridique communautaire*, in S. Rodrigues (dir.), *L'Union européenne: Union de droit, Union des droits. Mélanges en l'honneur de Philippe Manin*, Paris: Pédone, 2010, p. 190; A. Rosas, *The European Court of Justice and Public International Law*, in J. WOUTERS, P.A. NOLLKAEMPER, E. DE WET (eds), *The Europeanisation of International Law as Law of the EU*, The Hague: T.M.C. Asser Press, 2008, p. 71. Taking into consideration the process of domestic implementation of international law, Cannizzaro is of the opinion that the EU legal order must be described as "neo-monist": see E. CANNIZZARO, *The Neo-Monism of the European Legal Order*, in E. CANNIZZARO (ed.), *International Law as Law of the EU*, The Hague: Martinus Nijhoff, 2011, p. 35.

[26] Opinion of AG Poiares Maduro, *Kadi*, cit., para. 24.

[27] The international agreements are concluded under Art. 218, para. 6, TEU by the Council of Ministers.

ment.[28] Of course, the Court's jurisdiction arises only "in the context of the internal and autonomous legal order of the Community".[29]

Ms Icsid: Would you not agree that the CJEU goes too far in reviewing the conformity of EU law with international law? The prime example is the *Kadi* case, in which the Court of Justice effectively assessed the validity of UN Security Council measures under EU law. The Court held that "an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system",[30] essentially claiming precedence of EU law over the Security Council decisions. Would you not think that the Court is endorsing the tradition of nationalism or "fortress Europe", as some legal scholars noted while casting a critical eye over this judgment?[31]

Furthermore, the CJEU looks at the EU as an almost perfect legal order, in which all EU acts endorse protection of human rights as a condition of their validity, and can be reviewed in "the framework of the complete system of legal remedies established by the Treaty".[32] It seems to me that EU law claims superiority over international law, because it is the rule of law order. At the same time, the CJEU sends an implicit message that international law does not comply with the rule of law, at least not to the same extent. The Court explains this in the following terms: "The Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions".[33]

Professor Van Gend en Loos: The *Kadi* judgment has to be examined in its specific context. It has to be noted that, at the time when this judgment was delivered, restrictive measures adopted by the Security Council were not subject to any kind of review. These black list measures were fleshed out into the EU legal order, as a matter of efficiency, by a specific EU secondary act – a regulation – which had to be consistent with the general principles of the EU legal order, including fundamental rights.[34] The CJEU

[28] Court of Justice, judgment of 10 March 1998, case C-122/95, *Germany v. Council of the European Union*; judgment of 11 September 2003, case C-211/01, *European Commission v. Council of the European Union*.

[29] *Kadi*, cit., para. 317.

[30] *Ibid.*, para. 282.

[31] See for example, C. TOMUSCHAT, *The Kadi Case: What Relationship Is There Between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order*, in *Yearbook of European Law*, 2009, p. 654.

[32] *Kadi*, cit., paras 284-285.

[33] *Ibid.*, para. 281.

[34] *Kadi* case concerned the adoption of restrictive measures executing the UN sanctions against the Taliban regime in Afghanistan. The adoption of national measures freezing the assets of the claimants in each Member State would have been ineffective given the free movement of capital within the internal market. Accordingly, the EU adopted a series of measures at the Community level to give effect to Mem-

did not review the lawfulness of the Security Council measures but the lawfulness of an Union act that gives effect to these international law measure. The claimant had a remedy to challenge the EU secondary act while he was deprived of such a remedy under UN law. Hence, would you not agree that EU law offered a better protection to the claimant? That was what the Court had in mind when it asserted that "the Community is based on the rule of law".

Ms Icsid: I would agree that international law, although a rules-based order, in the absence of review mechanisms of measures adopted under these rules, is not perfectly implementing the rule of law. However, it is almost as the EU asserts its specific international law nature, which is with its "complete system of legal remedies and procedures" also a higher rule of law, as an excuse when it wishes to justify its prevalence over international law. In other words, EU law is "better" international law, to say-so. For this reason, it affirms its supremacy whenever international law is unable to achieve the EU law standards, as assessed by the EU itself.

Professor Van Gen den Loos: The autonomy of the EU legal order has been buttressed in 2009 by the integration of the Charter of Fundamental Rights of the European Union (EU Charter) into primary law in accordance with Art. 6, para. 1, TEU. This bill of rights clearly brings the EU legal order closer to a constitutional order. What is more, given that the EU acknowledges the protection of human rights as one of its key values, domestic constitutional courts cannot anymore claim that EU law may trump their bill of rights.[35] *Kadi* case was a reaction to the insufficient protection of fundamental rights at the UN level. Today, given that the UN review mechanism has been improved in the wake of this judgment, *Kadi* might have been ruled differently.[36]

Ms Icsid: Nevertheless, in light of the *Kadi* judgment, I am still not convinced that the EU legal order is monist. The relationship between EU law and international law is, in practical terms at least, determined by the internal effects of international agreements in the EU legal order. This, arguably, renders EU law dualist.[37] The reception of WTO law into the EU legal order is a case in point. According to settled CJEU case-law, WTO Agreements have direct effect under very narrow conditions. Although the EU and its 28 Member States are parties to the WTO, it is nearly impossible for litigants to challenge

ber States' UN obligations, including an EU regulation. The claimant whose funds were frozen as a consequence of this action, challenged the EU regulation before the CJEU as the violation of his fundamental rights to property and a fair hearing.

[35] German Federal Constitutional Court, judgment of 29 May 1974, BVerfGE 31, 271, *Solange I - Internationale Handelsgesellschaft von Einfuhr - und Vorratsstelle für Getreide und Futtermittel*.

[36] See J. KOKOTT, C. SOBOTTA, *The Kadi Case – Constitutional Core Values and International Law – Finding the Balance*, in *European Journal of International Law*, 2012, p. 1019 *et seq*.

[37] See F. MARTINES, *Direct Effect of International Agreements of the European Union*, in *European Journal of International Law*, 2014, p. 129.

EU secondary law for breaching WTO law. It is hypocritical to claim that EU law is subordinated to international law and, at the same time, pick and choose when international law prevails over EU secondary law. In filtering the agreements that are deemed to be compatible with the EU legal order, the CJEU constantly sorts wheat from chaff.[38]

Professor Van Gen den Loos: One has to bear in mind that the CJEU has been endorsing a rather restrictive interpretation of the primacy of WTO law over EU secondary law for the reasons of reciprocity. In effect, the acknowledgment of direct effect of WTO Agreements' provisions would lead to a disequilibrium:[39] on the one hand, American litigants could invoke directly before the General Court of the EU these international provisions; on the other, European litigants could not invoke the same provisions before US courts.

Ms Icsid: Your argument with respect to WTO law indeed makes sense. It would not be politically opportune for the EU or its Member States to do otherwise. In many aspects WTO seems to be a political arrangement rather than a legal one.

However, so far in this discussion you focused on international agreements concluded by the EU. As you explained, the CJEU is empowered to nullify an EU decision concluding an agreement that hampers the general principles of EU law and to disapply incompatible provisions of an international agreement concluded by the EU in the case of their substantive inconsistency with EU law and international rules which are binding on the EU. After all, this is logical and any domestic court would do the same when reviewing the legality of acts made under domestic law. But how can EU law prevail over the agreements concluded between Member States and third non-EU States?

Professor Van Gend en Loos: The fact that EU law prevails over the Member States' national laws also implies that EU law prevails over international agreements to which Member States are parties. In effect, such agreements form the integral part of Member States' national legal orders. Therefore, Member States cannot enter into international agreements which would contain commitments for Member States capable of jeopardising the attainment of the objectives of the EU Treaties or affecting the EU rules.[40] In becoming Member States of the EU, they transferred part of their sovereignty to the EU, although they are sometimes still reluctant to accept this.

[38] A. BERRADMDANE, *Le droit international, un ordre juridique propre intégré au système juridique de l'Union*, IN B. BERTRAND, F. PICOD, S. ROLAND (dir.), *L'identité du droit de l'Union européenne. Mélanges en l'honneur de Claude Blumann*, Brussels: Bruylant, 2015, p. 288 *et seq*.

[39] Court of Justice, judgment of 23 November 1999, case C-149/96, *Portugal v. Council*, para. 47; General Court, judgment of 20 November 2002, case T-79/01, *Chiquita brands*; Court of Justice, judgment of 1 May 2005, case C-377/02, *Van Parys*.

[40] Court of Justice, judgment of 31 March 1971, case 22/70, *AETR*, paras 17 and 22; opinion 2/91 of 19 March 1993, paras 10-11.

II.2. EU law and Member States' BITs

Ms Icsid: In the particular context of the Member States' BITs, these agreements were concluded before the Lisbon Treaty of 2009, that is, before investment was included in the Common Commercial Policy. The EU had no powers with respect to their conclusion. Accordingly, BITs are international agreements concluded between independent States under international law and are thus exclusively governed by international law. The EU did nothing to indicate to the Member States the incompatibility of their intra-EU BITs with the EU obligations. Moreover, the EU encouraged prospective Member States to conclude BITs with the Member States before joining the EU.[41] And the accession to the EU did not imply Member States' duty to withdraw from their BITs.

Professor Van Gend en Loos: It is true that the EU encouraged candidate States to conclude BITs with the Member States prior to their accession, with an aim to establish "a favourable climate for private investment, both domestic and foreign".[42] Therefore, it could be said that the EU's aim was primarily focused on enhancing the overall investment climate in these countries, for their own benefit. However, when the Commission realised the incompatibility of intra-EU BITs with the functioning of the internal market,[43] in particular with respect to potential discrimination between investors from different Member States and the exclusive jurisdiction of the CJEU to interpret and apply EU law and State aid rules,[44] it strongly advocated against the maintenance of these treaties.[45] While Member States were fully aware of the Commission's concerns, most

[41] See for example, Art. 64 of the Europe Agreement of 1 February 1993 establishing an association between the European Economic Communities and their Member States, of the one part, and Romania, of the other part.

[42] Art. 85 of the Stabilisation and Association Agreement of 29 October 2001 between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part.

[43] See, for example, European Commission observations of 13 October 2011 in Permanent Court of Arbitration (PSA), case no. 2010-17, *European American Investment Bank AG v. Slovakia*.

[44] A notable example is the *Micula* case in which the arbitral tribunal ordered Romania to pay compensation to a Swedish investor, disregarding the Commission's position that such payment would infringe EU State aid rules: see ICSID, award on jurisdiction of 22 October 2012, case no. ARB/05/20, *Micula and Others v. Romania* (*2012 Micula v. Romania*). More recently, the issue of State aid has been prominent in a number of Energy Charter Treaty (ECT) cases against Spain, many of which are still pending. In a Decision of 10 November 2017, the Commission emphasised that any compensation to an investor on the basis of the modifications of the Spanish investment incentive scheme would qualify as State aid within the meaning of Art. 107 TFEU, which arbitral tribunals are not authorised to grant. Consequently, any payment of an award in these cases is subject to the standstill obligation: see Commission Decision C(2017) 7384 final of 10 November 2017 on State aid investigation.

[45] Economic and Financial Committee, 2008 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments of 17 December 2008, 17363/08, paras 16-18; 2009 Annual EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments of 10 December 2009, 17446/09, paras 16-18. Similar concerns have been raised in all subsequent reports of the Economic and Financial Committee up to date.

of them did not share the same views and ignored the European Commission's warnings.[46] In his opinion, AG Wathelet clearly highlighted the split between the Member States along political lines.[47] A number of Member States considered intra-EU BITs compatible with EU law and "in certain circumstances, indispensable to secure legal certainty for intra-EU investors until an alternative mechanism has been found".[48] But it should not be forgotten that the Commission used its legal powers to compel the Member States to terminate their BITs.[49]

Ms Icsid: With 181 intra-EU BITs still in force, the impression is that the Commission has not been very successful in using its "legal powers". And while still in force, I do not see how these agreements could be inapplicable under international law.

Professor Van Gend en Loos: Primacy of EU law is not only a matter of EU law but more importantly, it is a matter of international law. The drafters of the EU founding Treaties were well aware of the possibility of normative conflicts that could undermine the project of EU integration. For this reason, they introduced a conflict rule in Art. 351 TFEU, which explains why investment tribunals should reach the conclusion that EU law prevails over the BITs. This special conflict rule has been recognised by the international legal community as giving the EC Treaty "absolute precedence" over agreements that Member States have concluded between each other.[50] The provision of Art. 351 TFEU

[46] Some Member States unilaterally denounced their BITs in an earlier stage, notably Ireland and Italy in 2012 and 2013 respectively (however, in all truth Ireland ever concluded only one BIT – with the Czech Republic). Recently, the Czech Republic and Romania have terminated their intra-EU BITs, while Poland and Denmark suggested that they would follow. The Netherlands also announced that it would terminate all its 12 intra-EU BITs: see the Letter of the Dutch Minister for Foreign Trade and Development Cooperation to the Chairperson of the Dutch House of Representatives of 26 April 2018, res.cloudinary.com.

[47] AG Wathelet in his preliminary observations identified the division of Member States into two groups: (1) those Member States that are countries of origin of investors and which rarely or never appear as respondent States, thus not supporting the argument of incompatibility (Germany, France, the Netherlands, Austria and Finland), and (2) those Member States that regularly appear as respondent States in intra-EU arbitrations, thus supporting the argument of incompatibility (the Czech Republic, Estonia, Greece, Spain, Italy, Cyprus, Latvia, Hungary, Poland, Romania, Slovakia). See opinion of AG Wathelet delivered on 19 September 2017, case C-284/16, *Achmea*, paras 34-38.

[48] Economic and Financial Committee, Annual EFC Report for 2017 to the Commission and the Council on the Movement of Capital and the Freedom of Payments of 29 May 2018, 9411/18, pp. 2, 11-12.

[49] In June 2015, the Commission initiated infringement proceedings against five Member States (Austria, the Netherlands, Romania, Slovakia and Sweden) in accordance with Art. 258 TFEU and launched an administrative dialogue with the other 21 Member States who still had BITs in place (at that stage, all except Ireland and Italy): see European Commission Press Release of 18 June 2015, *Commission asks Member States to terminate their intra-EU bilateral investment treaties*. According to UNCTAD, 19 intra-EU BITs have been terminated because they expired, have been terminated by consent, or have been unilaterally denounced: see UNCTAD, *Investment Policy Hub*, cit.

[50] International Law Commission, *Fragmentation of International Law*. Report of the Study Group of the International Law Commission of 13 April 2006, finalised by Maarti Koskenniemi, A/CN.4/L.682, para. 283.

requires the Member States, whenever their international agreements concluded before their accession to the EU are not compatible with the Treaties, to "take all appropriate steps to eliminate the incompatibilities established". Moreover, "Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude".[51] It follows that whenever an agreement concluded by two Member States prior to their accession to the EU, such as the Netherlands – Slovakia BIT, is deemed to be incompatible with EU law, an obligation is placed on these States to remove the incompatibilities. The Member States are obliged not only to remove the pre-existing treaty obligations that clash with their EU obligations but also to eliminate any potential conflicts with future EU secondary law.[52] Such conflict rule perfectly makes sense because it reduces, let alone eliminates the risk of discrepancies within the EU legal order.[53]

Ms Icsid: However, Slovakia and the Netherlands did not remove these incompatibilities in their mutual BIT, whose ISDS clause was at the root of the controversy in *Achmea*. By the same token, other Member States made no attempts to renegotiate or modify their BITs prior to *Achmea*. In their respective investment treaties Member States have granted their consent to submit to arbitration *any* claim against them, with no exclusion of intra-EU claims. Therefore, their offer to arbitrate in intra-EU context expressed in these treaties was and still is valid under international law. How could developments in EU law in any way undermine prior consent to arbitration, which the States offered in their intra-EU investment treaties?[54] Moreover, even if the BIT was implicitly and retroactively terminated at the time Slovakia joined the EU in 2004, it would still remain in force for a period of 15 years due to the sunset clause.[55]

Professor Van Gend en Loos: As a matter of course, the accession to the EU did not entail an explicit withdrawal from the Netherlands – Slovakia BIT. However, ISDS clauses in this and other intra-EU BITs must be regarded as superseded by subsequent interna-

[51] Art. 351, para. 2, TFEU.

[52] Court of Justice, judgment of 3 March 2009, case C-205/06, *European Commission v. Austria*; judgment of 3 March 2009, case C-249/06, *European Commission v. Sweden*; judgment of 19 November 2009, case C-118/07, *European Commission v. Finland*.

[53] Court of justice, judgment of 2 August 1993, case C-158/91, *Levy*. This is also clearly expressed in Art. 351, para. 3, TFEU: "In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States".

[54] To that effect, see ICSID, award of 15 June 2018, case no. ARB/13/31, *Antin Infrastructure Services Luxembourg S.à. r.l. and Antin Energia Termosolar B.V. v. Kingdom of Spain*, para. 224. Although this case involved the ECT, the argument *mutatis mutandi* can be applied to BITs.

[55] Art. 13 of 1991 Netherlands – Slovakia BIT.

tional treaties concluded between the Member States. In the case of Central and Eastern European States, incompatible provisions of intra-EU BITs are firstly superseded by the Treaty on Accession, as from the date of accession of these Member States to the Union (1 May 2004).[56]

Secondly, the Treaty of Lisbon to which all Member States are a party has amended and consolidated the text of the original EU Treaties. In accordance with Art. 30, para. 3, VCLT, when all the parties to the earlier treaty are also parties to the later treaty but the earlier treaty is not terminated or suspended, the earlier treaty applies only to the extent to which its provisions are compatible with the later treaty.

After *Achmea*, the incompatibility between the ISDS clauses in intra-EU BITs and EU law is undisputable from an EU perspective and it should also be, for these reasons, clear from an international law perspective.

Ms Icsid: However, it must be noted that Art. 30 VCLT applies to successive treaties relating to the same subject matter. It is open to discussion whether BITs and EU Treaties relate to the same subject matter.[57] Furthermore, how could the *Achmea* judgment, which is clearly placed in a national or regional context, undermine Member States' obligations under the ICSID Convention,[58] which is an instrument of public international law? In your view, is the ICSID Convention also incompatible with EU law? All Member States except Poland are parties to the ICSID Convention. It is undisputed that Member States did not expressly or impliedly terminate their participation in the ICSID Convention when they joined the EU.[59] The *Achmea* judgment cannot be interpreted to support the argument that Member States are no longer bound by the ICSID Convention following their accession to the EU.[60] Consequently, consent to arbitration under Art. 25 of the ICSID Convention is valid and once given, could not be unilaterally or retroactively with-

[56] See the Act of Accession (which is part of the Treaty of Accession) of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and the Slovak Republic, Arts 2 and 6; the Act of Accession of Bulgaria and Romania, Arts 2 and 6; the Act of Accession of the Republic of Croatia, Arts 2 and 6.

[57] See *Vattenfall II*, cit., para. 212; Arbitral Tribunal of Stockholm Chamber of Commerce (SCC), partial award of 27 March 2007, case no. 088/2004, *Eastern Sugar B.V. v. Czech Republic*, para. 159; Permanent Court of Arbitration, award on jurisdiction, arbitrability and suspension of 26 October 2010, case no. 2008-13, *Achmea B.V. v. The Slovak Republic* (formerly *Eureko B.V. v. Slovak Republic*), para. 258; award on jurisdiction of 22 October 2012, *European American Investment Bank AG v. The Slovak Republic*, para. 184; Arbitral Tribunal of Stockholm Chamber of Commerce, award of 15 February 2018, case no. 2015/063, *Novenergia II - Energy and Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, para. 439; opinion of AG Wathelet, *Achmea*, cit., paras 56-57 and paras therein mentioned.

[58] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) of 18 March 1965.

[59] ICSID, award of 9 October 2018, case no. ARB/13/35, *UP (formerly Le Chèque Déjeuner) and C.D. Holding Internationale v. Hungary*, paras 259-260.

[60] *Ibid*., para. 258.

drawn under Art. 72 of the ICSID Convention.[61] In light of these arguments, I do not see why ICSID tribunals would not have jurisdiction to adjudicate intra-EU disputes.

Professor Van Gend en Loos: All protections available to intra-EU investors under BITs are also available under EU law. The fact that the EU Treaties and the CJEU case-law have a wider scope *ratione materiae* than the BITs does not exclude the applicability of Art. 30 VCLT.[62] With respect to the ICSID Convention, one has to note that ICSID is not an autonomous system within international investment law. ICSID establishes procedure (forum and rules) for the settlement of disputes arising out of a particular international investment agreement. An intra-EU BIT could be considered *lex specialis* which supersedes the *lex generalis* enshrined in the ICSID provisions. In any case, without a particular BIT, which prescribes both substantive protections and the mechanism for their implementation through an ISDS clause, there could not be an investment claim and hence, the ICSID Convention could not apply. Additionally, the EU is not a party to the ICSID Convention, which is thus not part of the EU legal order. Therefore, in case of a conflict between EU law and the ICSID Convention, national courts are called on to disapply the latter,[63] in the same manner as they must disapply incompatible provisions of an intra-EU BIT or the ECT. Even if there was a valid offer to arbitrate, such offer is inapplicable in all cases because it is incompatible with EU law. Therefore, *Achmea* sends a clear message to investors and their lawyers that they should not rely any more on ISDS clauses in intra-EU context.

II.3. The peculiar case of the ECT[64]

Ms Icsid: When you refer to the "intra-EU context", does this also include the inapplicability of the ISDS clause in intra-EU disputes under the ECT?[65] Based on what you said so far,

[61] *Ibid*., paras 261-264.

[62] To this effect, see also discussion on the ECT, *infra* under section II.3. For explanation of investment protections under EU law, see Communication COM(2018) 547 final of 19 July 2018 from the Commission to the European Parliament and the Council, *Protection of intra-EU investment*.

[63] See the discussion *infra* under section V.3.

[64] In 1994, both the EU (Decision 98/181/EC, ECSC, Euratom of the Council and Commission of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects) and its Member States concluded the ECT. The ECT has the same status in the EU legal order as a purely EU agreement (exclusive competence) insofar as its provisions fall within the scope of EU competence. In addition, the EU is legally bound by the obligations on fair and equitable treatment and non-expropriation contained in the ECT. Accordingly, the compliance by EU secondary law with the ECT obligations may be subject to review before the EU courts. Needless to say, secondary law must be interpreted in accordance with the EU's obligations stemming from the ECT (Court of Justice, judgment of 10 September 1996, case C-61/94, *European Commission v. Germany*, para. 52). Since the ECT is a mixed agreement, it follows that it is implemented and managed jointly by the EU and the Member States: see opinion of AG Jääskinen delivered on 15 March 2011, case C-264/09, *European Commission v. Slovakia*, para. 60. So far, only one Member State, Italy, has withdrawn from the ECT.

there is a big difference between intra-EU BITs and the ECT. BITs' compatibility with EU law became an issue following the accession of Central and Eastern European countries to the EU. However, the ECT was actually concluded between all EU Member States at that time and thus, effectively was an intra-EU agreement. Additionally, since the EU is a party to the ECT, the ECT also has binding effect on the EU and is a source of EU law. If the Commission now claims that the ECT is inconsistent with EU primary law, why has the EU joined this treaty in the first place? Moreover, why did the Commission play a crucial role in negotiating an agreement incompatible with EU law? As correctly noted by the *Electrabel* tribunal, "as a matter of legal, political and economic history, the European Union was the determining actor in the creation of the ECT".[66] Consequently, "the ECT's genesis generates a presumption that no contradiction exists between the ECT and EU law",[67] as they "share the same broad objective in combating anti-competitive conduct".[68]

Professor Van Gend en Loos: The ECT was concluded in 1994 when these issues were not yet controversial. At the time, it was a geopolitically important multilateral treaty, aimed at reducing investment risks for Western European investors in energy-related investment after the fall of communism in then unpredictable markets of Eastern Europe and the former Soviet Union. The EU had 12 Member States whose economic interests were more or less coordinated: on the one hand, they wanted to ensure the expansion to new markets; on the other, it was important to guarantee sustainability of energy use in Europe.[69] There has never been any intention to apply the ECT in disputes opposing EU investors and Member States. In other words, it was never intended that the ECT would be applied as an intra-EU multilateral treaty. The fact that the EU is a party to the ECT does not affect the applicability of the ECT in intra-EU disputes. As already explained, international agreements of the EU are applicable to the extent that they are compatible with EU primary law.

Ms Icsid: However, one has to rely on the explicit provisions of the ECT when determining jurisdiction in intra-EU context, instead of reading into the text of the ECT something that is not expressly stated therein. In this regard, Art. 16 ECT clearly states that the contracting parties to the ECT, including the EU, have agreed that, any prior or subsequent treaties that parties enter into with each other, shall not be construed so as to derogate from substantive protections or the right to dispute settlement mechanism of the ECT, where the ECT provision is more favourable to the investor or investment. It seems to me that there is no doubt that the ECT is more favourable to investors than EU law. Therefore, as a con-

[65] According to the Commission, the *Achmea* judgment applies to all intra-EU investment disputes, including those under the ECT: see Communication COM(2018) 547, pp. 3-4.

[66] *Electrabel v. Hungary*, cit., para. 4.131.

[67] *Ibid.*, para. 134.

[68] *Ibid.*, paras 4.137 *et seq.*

[69] European Commission Press Release of 17 December 1994, europa.eu.

flict rule determining the relationship between the ECT and other international treaties, Art. 16 ECT makes clear that in case of a conflict between the ECT and EU law, the ECT should prevail because it is a more favourable agreement for investors in the EU. As such, it poses "an insurmountable obstacle" to the argument that EU law should prevail over the ECT, in particular in cases involving two "old" Member States.[70]

Professor Van Gend en Loos: Investment tribunals heavily rely on allegedly "clearer conflict rule" over the EU conflict rule in Art. 351 TFEU,[71] although Art. 16 ECT remains controversial as a conflict rule. Art. 16 should rather be understood as an interpretative rule as it explicitly refers to "construing" rights. Instead, Art. 351 TFEU and Art. 30 VCLT are the relevant conflict rules to be applied in intra-EU disputes under the ECT. The only tribunal which correctly asserted that EU law prevails over the ECT, in view of both EU law and general international law, was the tribunal in *Electrabel*.[72] Although *Electrabel* dispute involved an "old" and a "new" Member State, namely a claim by a Belgian investor against Hungary, whereby the ECT was initially concluded as an extra-EU international treaty, the same conclusion should be reached in cases of disputes between "old" Member States.[73] Precedence of EU primary law over the ECT in such cases is clear in light of *a contrario* interpretation of Art. 351 TFEU and Art. 30, para. 3, VCLT since the ECT has been overridden by all successive treaties between "old" EU Member States concluded after the ECT's entry into force.[74] Therefore, investment tribunals should apply the ECT in light of EU law.[75] And primary EU law, as explained by the CJEU in the *Achmea* judgment, renders their jurisdiction inapplicable in intra-EU disputes.

III. *Achmea* or how international investment tribunals do not understand EU law

[70] *Vattenfall II*, cit., para. 229.

[71] *Ibid.*, para. 227.

[72] The tribunal's analysis was, however, hypothetical as the tribunal did not find any material inconsistency between EU law and the ECT: *Electrabel v. Hungary*, cit., paras 4.166-4.167. With respect to a potential conflict between EU law and ISDS mechanism, the tribunal reached the conclusion that "nothing in EU law can be interpreted as precluding investor-State arbitration under the ECT and the ICSID Convention" (para. 4.175). With respect to a potential conflict between EU law and substantive protections under the ECT, the tribunal reached the conclusion that the two do not share the same subject-matter but still, however, "share much in common" (paras 4.176-4.177).

[73] See the analysis in *Electrabel v. Hungary*, cit., paras 4.178-4.191. The tribunal thus concluded: "In summary, from whatever perspective the relationship between the ECT and EU law is examined, the tribunal concludes that EU law would prevail over the ECT in case of any material inconsistency".

[74] Treaty of Amsterdam (1999), Treaty of Nice (2003), Treaty of Lisbon (2009). To this effect, see also the Commission's submission in *Vattenfall II*, cit., para. 91. In the *Vattenfall II* case, to support the argument of primacy of EU law over the ECT, the Commission has also invoked VCLT Art. 41 (modification of international treaties). According to this argument, by concluding subsequent EU treaties after the ratification of the ECT, Germany and Sweden amended the ECT in order to apply EU law in their mutual relations.

[75] *Electrabel v. Hungary*, cit., para. 4.130.

III.1. Why investment tribunals do not have jurisdiction in all intra-EU disputes?

Ms Icsid: The argument that the *Achmea* judgment applies to all intra-EU arbitrations, both under intra-EU BITs and the ECT is, however, unsupported in light of the text of this judgment and the questions asked by the referring German court. *Achmea* applies *only* to BITs – that is, bilateral and not multilateral treaties, and *only* to those BITs concluded between the Member States. As we know, the ECT is not a bilateral treaty between the Member States but a multilateral treaty to which the EU is also a party.[76]

Furthermore, *Achmea* relates only to those intra-EU BITs that contain the *same* ISDS clause as the Netherlands – Slovakia BIT that was questioned in *Achmea*. In particular, it is relevant that this ISDS clause explicitly defines "the law in force of the Contracting Party" as the applicable law. In interpreting this ISDS provision, the CJEU drew the conclusion that investment tribunals "*may* be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital" – a competence that exclusively belongs to the CJEU.[77] The Court of Justice asserted squarely that only ISDS clause "such as" the one in the Netherlands-Slovakia BIT is incompatible with TFEU Arts 267 and 344, and not all ISDS clauses in all intra-EU BITs.[78] Therefore, the *Achmea* judgment is of limited application.

Professor Van Gend en Loos: Such interpretation of *Achmea* is too narrow. You are exclusively focusing on the BIT at issue in the manner of a common law lawyer who is arguing their case by distinguishing it from a precedent that does not suit them. Whether the agreement is bilateral or multilateral, and whether the EU is party to an agreement or not is irrelevant for the case in point. In approaching *Achmea* narrowly, you fail to grapple with the logic of the CJEU and its legal order that the Court is called to defend under the Treaties.

The *Achmea* judgment must be placed in the broader picture of the EU judicial system. This is what the CJEU stressed as its main reason for declaring the ISDS clause at issue incompatible with EU law. The essence of the problem is that investment tribunals do not sit within the EU judicial system[79] while domestic courts form an essential part of that system. The EU judicial system reckons upon the cooperation between the CJEU and the domestic courts of the 28 Member States. In this system, the domestic courts are called on to apply EU law although they might not quash EU legal acts. They do so in close cooperation with the CJEU through the preliminary ruling procedure. Unlike in-

[76] ICSID, award of 16 May 2018, case no. ARB/14/1, *Masdar Solar and Wind Cooperatief U.A. v. Kingdom of Spain*, paras 679-680 (emphasis added).

[77] *Achmea* [GC], cit., paras 40-42 (emphasis added).

[78] *Ibid.*, para. 60.

[79] *Ibid.*, para. 45.

vestment tribunals, domestic courts can refer questions for a preliminary ruling in accordance with Art. 267 TFEU. This is relevant with respect to two aspects.

Firstly, in providing a preliminary ruling mechanism, the Treaty ensures that the CJEU deals with all questions of interpretation and application of EU law. In so doing, the uniformity of EU law is guaranteed.[80] The preliminary ruling procedure in Art. 267 TFEU is the "keystone" of the EU judicial system as it establishes a *dialogue* between the CJEU and the courts and tribunals of the Member States.[81] This dialogue has for its object "securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties".[82] Plainly speaking, every national court in the EU, faced with an EU legal issue, refers relevant questions regarding the interpretation of EU law to the CJEU, thus ensuring the consistent interpretation of EU law by the CJEU. Therefore, the preliminary ruling procedure enhances the dialogue between the CJEU and the national courts with a view to achieving a uniform application of EU law across the EU.[83] Since investment tribunals cannot refer questions of EU law to the CJEU, this may lead to inconsistent interpretation of EU law. As a consequence, the EU legal system enhances uniformity and consistency; on the contrary, international investment law is characterised by its inconsistency. After all, these inconsistencies are one of the reasons for the currently ongoing global ISDS reform.[84]

Secondly, since investment tribunals are situated outside the EU judicial system, their awards cannot be subject to control by domestic courts and the CJEU for their compliance with EU law. In words of the CJEU, their awards cannot be subject to "mechanisms" of the EU judicial system which ensure "the full effectiveness of the rules of the EU".[85] In accordance with Art. 19, para. 1, TEU, it is for the national court and the CJEU "to ensure the full application of EU law in all Member States".[86] It is settled case-law that it is "for the national courts and tribunals and for the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of an individual's rights under that law".[87] In doing so, domestic courts ensure that national law complies with EU law. However, in case of intra-EU investment awards, there is no

[80] Court of Justice, judgment of 24 November 2011, case C-281/09, *European Commission v. Spain*, para. 42.

[81] *Ibid.*, para. 37.

[82] Court of Justice, opinion 2/13 of 18 December 2014, para. 176.

[83] Court of Justice, judgment of 13 May 1981, case 66/80, *SpA International Chemical Corporation*, para. 11.

[84] United Nations Commission on International Trade Law (UNCITRAL), Note by the Secretariat of 28 August 2018, *Possible reform of investor-State dispute settlement: Consistency and related matters*, UN Doc. A/CN.9/WG.III/WP.150.

[85] *Achmea* [GC], cit., para. 43.

[86] *Ibid.*, para. 36.

[87] Court of Justice, opinion 1/09 of 8 March 2011, para. 68; opinion 2/13, cit., para. 175.

such mechanism whatsoever. Consequently, awards inconsistent with EU law are valid: this ultimately challenges the EU legal order.

Therefore, ISDS interference with EU law in intra-EU disputes challenges the very foundations of the EU legal order. This is irrespective of whether ISDS mechanism providing for intra-EU disputes is encapsulated in intra-EU BITs, the ECT or the ICSID arbitration, and irrespective of the particular expression or formulation of ISDS mechanism in these instruments.

III.2. The Advocate General's opinion is not legally binding and preliminary ruling only answers the questions asked

Ms Icsid: If that was indeed the case, learned colleague, why the CJEU did not clearly say that its ruling also relates to intra-EU disputes under the ECT? Why the CJEU did not address, depart from, or reject the opinion of AG Wathelet dated 19 September 2017, which emphasised the distinction between intra-EU BITs and the ECT?[88] In particular, if the AG noted that the ECT was concluded "as an ordinary multilateral treaty in which all the Contracting Parties participate on an equal footing", why the CJEU did not correct the AG' reasoning and address the exclusion of ISDS mechanism in intra-EU disputes? Moreover, why the CJEU did not refute the assertion of the AG that "no EU institution and no Member State" sought an opinion from the Court on the compatibility between the ECT and the founding Treaties "because none of them had the slightest suggestion that it might be incompatible"?[89] Instead, in *Achmea* the CJEU is simply silent on the issue of compatibility of intra-EU ISDS under the ECT with EU law. Consequently, several investment tribunals have been recently asserting their jurisdiction in intra-EU disputes relying on the AG opinion.[90]

Professor Van Gend en Loos: The CJEU answered only those questions which had been submitted by the domestic court. In *Achmea*, the German *Bundesgerichtshof* (Federal Court of Justice) expressed doubts concerning the compatibility of the Netherlands-Slovakian BIT with Arts 267 and 344 TFEU and with the principle of non-discrimination set forth in Art. 18 TFEU. For these reasons, it asked the CJEU to give a preliminary ruling as regards these questions. It is the task of the CJEU to answer only those questions that the referring domestic court asked, and to the extent that is necessary for the referring court to correctly apply EU law in the main proceedings. In so doing, the CJEU differs from a common law court, which in its judgments not only rules on the legal is-

[88] Opinion of AG Wathelet, *Achmea*, cit.
[89] *Ibid.*, para. 43.
[90] *Masdar v. Spain*, cit., para. 682; *Vattenfall II*, cit., para. 163.

sue but also provides discussions of doctrine, disquisitions of legal concepts or policy arguments based on considerations outside of legal discourse.[91]

AGs provide independent and impartial opinions concerning the case at issue prior to the Court's deliberations.[92] That said, their opinions are not binding upon the Court. Indeed, dissenting AG's opinions do not call into question the legal validity of the CJEU's judgment. Accordingly, the investment tribunals cannot reckon upon the reasoning of AG Melchior Wathelet.

Ms Icsid: However, it is clear that the *Achmea* judgment relies expressly on very particular aspects: 1) the place of arbitration is Frankfurt and therefore, German law applies to the arbitral proceedings; 2) the judicial review falls within the competence of German courts; 3) in the review process, the German Federal Court of Justice submitted a number of preliminary questions to the CJEU.[93] None of these aspects apply in the majority of other intra-EU arbitrations. It is therefore, logical to conclude that in *Achmea* the CJEU merely answered the questions referred by the German *Bundesgerichtshof* regarding the validity of the clause provided for in the Netherlands – Slovakia BIT. Accordingly, it is impossible to generalise anything from that judgment.

Professor Van Gend en Loos: This is not at all the case. Of importance is to note that the CJEU judgments interpreting EU law enjoy an authority similar to those of national supreme courts in civil law countries. Accordingly, after receiving the answer from the CJEU to a question concerning the interpretation of EU law which it has submitted to the Court, or where the case-law of the CJEU already provides a clear answer to that question, the domestic court is itself required "to do everything necessary to ensure that that interpretation of EU law is applied".[94] What is more, the national court must set aside the provisions of national law declared to be inconsistent with EU law, without having to request or await its prior removal by the legislature.[95]

It follows that the preliminary ruling of the CJEU in *Achmea* is not only binding on the German court involved in resolving the dispute that gave rise to the preliminary ruling (*inter partes*); the ruling is also binding *erga omnes*, on all other courts of all Member States (*autorité de la chose interprétée*).[96] In other words, preliminary rulings are

[91] For comparative analysis of legal reasoning in judicial opinions in common law and civil law judgments, see M. WELLS, *French and American Judicial Opinions*, in *Yale Journal of International Law*, 1994, p. 101. See also P. BOURDIEU, *The Force of Law: Toward a Sociology of Judicial Field*, in *Hastings Law Journal*, 1987, p. 38. Although the CJEU could not be considered a civil law court, its legal reasoning rather resembles a civil law method.

[92] Art. 19, para. 2, TEU.

[93] *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, cit., para. 254.

[94] Court of Justice, judgment of 5 April 2016, case C-689/13, *Puligienica Facility Esco SpA*.

[95] Court of Justice, judgment of 21 June 2007, case C-231/06 to C-233/06, *Emilienne Jonkman*.

[96] A. TRABUCCHI, *L'effet erga omnes des décisions préjudicielles rendues par la Cour de justice des communautés européennes*, in *Revue trimestrielle des droit de l'homme*, 1974, p. 56 *et seq.*; S. VAN

binding both on the referring court and on all courts in the EU.[97] It follows that all other courts have to interpret the EU rule in question in accordance with the operative part and the *ratio* of the preliminary ruling.[98] Since in *Achmea* the CJEU found the intra-EU ISDS mechanism inconsistent with EU law, no national court may reach an opposite conclusion. And since the CJEU did not provide any temporal limitation of the effects of its ruling (limitation *ratione temporis*), all EU Member States are bound *ex tunc* by the preliminary ruling in *Achmea*.[99] This is different to a precedent of a common law court, which applies *ex nunc*. Therefore, the provisions under which an investor from one of the Member States may, in the event of a dispute concerning investments in another Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept in an investment treaty, have become inapplicable throughout the EU.[100] Accordingly, as the German *Bundesgerichtshof* decided that Slovakia's offer to arbitrate was inapplicable on the ground that it was incompatible with EU law, and thus no effective arbitration agreement could not have been concluded,[101] every other national court, if confronted with an intra-EU investment award, should reach the same conclusion.

III.3. Why is commercial arbitration different from investment arbitration?

Ms Icsid: Why the CJEU in *Achmea* made a distinction between investment and commercial arbitration, asserting that the former is incompatible and the latter compatible with EU law? Commercial arbitration tribunals, in the same manner as investment tri-

Raepenbush, *Droit institutionnel de l'Union européenne*, cit., p. 624; F. Picod (dir.), *Europe Traité*, Vol. 3, Paris: Lexis Nexis, 2016, p. 19. Cf. A. Toth, *The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects*, in *Yearbook of European Law*, 1984, p. 1 *et seq*.

[97] To this effect, see *SpA International Chemical Corporation*, cit., paras 12-13 and 15; Court of Justice, judgment of 5 October 2010, case C-173/09, *Elchinov*, para. 29; *Puligienica Facility Esco SpA*, cit., para. 38. Since the CJEU prescribes to civil law tradition, its judgments are assumed to have declaratory effect (they do not create new law but clarify the existing rules) and have binding effect on all relationships governed by the legal instrument since it entered into force: D. Chalmers, G. Davies, G. Monti, *European Union Law*, Cambridge: Cambridge University Press, 2010, p. 171.

[98] *SpA International Chemical Corporation*, cit., para. 13; Court of Justice, judgment of 22 October 1987, case 314/85, *Foto-Frost*.

[99] Court of Justice: judgment of 27 March 1980, case 61/79, *Amministrazione delle* finanze *dello Stato v. Denkavit*, para. 16; judgment of 13 January 2004, case C-453/00, *Kühne and Heitz v. Productschap voor Pluimvee en Eieren*, para. 21. See also M. Broberg, N. Fenger, *Preliminary References to the European Court of Justice*, Oxford: Oxford University Press, 2010, p. 445.

[100] N. de Sadeleer, *The End of the Game: The Autonomy of the EU Legal Order Opposes Arbitral Tribunals Under Bilateral Investment Treaties Concluded Between Two Member States*, in *European Journal of Risk Regulation*, 2018, p. 366.

[101] German Federal Court of Justice, judgment of 31 October 2018, I ZB 2/15, para. 25.

bunals, are not "courts or tribunals of Member States".[102] Therefore, they also cannot refer questions of EU law for preliminary ruling to the CJEU. In the same manner, commercial arbitration in the EU may lead to awards incompatible with EU law. However, in spite of these risks, the validity of their awards has never been disputed by the CJEU. Moreover, in light of the CJEU's reasoning in *Achmea*, it seems that the validity of commercial arbitration under EU law has been reinforced.[103]

Professor Van Gend en Loos: Although commercial tribunals cannot refer questions for a preliminary ruling, there are two significant differences between commercial and investment arbitration. Firstly, commercial arbitration originates in "the freely expressed wishes of the parties" stated in an arbitration agreement. On the contrary, investment arbitration originates in an international treaty between two Member States, who have removed from their jurisdiction intra-EU disputes although such disputes "may concern the application and interpretation of EU law".[104] This is in direct contradiction with the Member States' obligations under EU law, in particular Art. 344 TFEU, by which Member States have undertaken not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaty. In other words, under Art. 344 TFEU Member States have undertaken to submit their *inter se* disputes concerning the interpretation and application of EU law *exclusively* to a dispute settlement mechanism within the EU judicial system. As we know by now, it is undisputed that investment tribunals do not form part of the EU judicial system. Therefore, it is now also clear that Art. 344 TFEU applies not only to disputes between Member States *inter se*, as clarified by the Court of Justice in *MOX Plant* case,[105] but also to disputes between private parties and Member States when such disputes concern the interpretation and the application of EU law. This reasoning moves away from what investment tribunals have hitherto been claiming.[106]

Secondly and more importantly, the review of commercial awards regarding their compatibility with EU law is possible in the enforcement stage. Conversely, the review of

[102] Court of Justice, judgment of 23 March 1982, case C-102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG and Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG and Co. KG*, para. 13. See M. BROBERG, N. FENGER, *Preliminary References to the European Court of Justice*, cit., pp. 80-81.

[103] To that effect see *Achmea* [GC], cit., paras 54-55.

[104] *Ibid.*, para. 55.

[105] Court of Justice, judgment of 30 May 2006, case C-459/03, *European Commission v. Ireland*.

[106] See for example, *Achmea B.V. v. The Slovak Republic*, cit., para. 276; UNCITRAL, decision on jurisdiction of 30 April 2010, *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, paras 72 and 98; *Eastern Sugar B.V. v. The Czech Republic*, cit., paras 172, 175; *Electrabel v. Hungary*, cit., para. 4.150; Arbitral Tribunal of Stockholm Chamber of Commerce, award of 21 January 2016, case no. V 062/2012, *Charanne and Construction Investments v. Spain*, paras 441-447; ICSID, final award of 4 May 2017, case no. ARB/13/36, *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, para. 204; *Novenergia v. Spain*, cit., para. 441.

investment awards depends on the applicable domestic law and the type of award. It must be noted that such review is fully excluded in the case of ICSID awards. When reviewing commercial awards, national courts can review the validity of arbitration agreements under the applicable law as well as the consistency of the award with public policy.[107] Although such review is limited in its scope, it allows for examination of the compatibility of the commercial award with the fundamental provisions of EU law.[108] In the course of such review, national courts can also refer questions of EU law for a preliminary ruling.[109] Therefore, with respect to commercial arbitration, national courts can review and thus control the compatibility of awards with EU law. Consequently, Member States can ensure the full application of EU law in accordance with their obligation under Art. 19, para. 1, TEU.

Ms Icsid: However, there is "no automatic reference to or seizure by the CJEU, as soon as any question of EU law arises before a national court", which consequently leaves open "the possibility, if not the probability, of divergent interpretations or applications of EU law to similar disputes by courts and tribunals within the European Union".[110] It also seems to me that the problem with investment arbitration could have been avoided if the CJEU followed AG Wahtelet's opinion in which he concluded that investment tribunals could be considered "courts or tribunals of Member States".[111] If investment tribunals had an avenue to refer their questions to the CJEU, the review of investment awards for their compatibility with EU law would not have been a problem. In light of the discretion given to the national courts, the mere existence of a possibility of referral given to investment tribunals would have been sufficient to ensure control of the compatibility of their awards with EU law.

Professor Van Gend en Loos: In a case brought before a national court, whenever a question of interpretation which is new and of general interest for the uniform application of EU law is raised, or where the existing case-law does not appear to give the necessary guidance to deal with a new legal situation, the domestic courts should refer to the CJEU a question for a preliminary ruling. Although there is a certain degree of discretion given to national courts in deciding when to refer the relevant questions to the CJEU, there are mechanisms in EU law to ensure that national courts comply with pre-

[107] In this regard, domestic legislation is mostly harmonised and allows for a limited review, implementing the grounds for review of arbitral awards prescribed in Art. 5 of the 1958 New York Convention for enforcement of arbitral awards. However, national courts do not interpret these grounds in the same manner, which can lead to differences between jurisdictions.

[108] Court of Justice, judgment of 1 June 1999, case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV*, paras 35-36.

[109] *Ibid.*, para. 40.

[110] *Electrabel v. Hungary*, cit., para. 4.148.

[111] Opinion of AG Wathelet, *Achmea*, cit., paras 89-131.

liminary ruling requirements. "Where there is no judicial remedy against the decision of a national court", the domestic court is in principle obliged to make a reference to the CJEU where a question of the interpretation of the Treaty is raised before it.[112] The fact of not referring the questions could give rise to an infringement proceeding in accordance with Art. 258 TFEU[113] and State liability.[114] It must be emphasised that the dialogue between national courts and the CJEU is aimed at building mutual trust and cooperation between the courts in the EU, which would be difficult if the national courts' authority to make preliminary reference at their own discretion was undermined. Ultimately, such judicial cooperation has been designed to ensure compliance with EU law, which "is of the essence of the rule of law".[115]

Although the CJEU found that investment tribunals are not courts or tribunals of Member States, they still might have an indirect recourse to the preliminary ruling procedure under Art. 267 TFEU, through the assistance of national courts.[116] However, even with such possibility, I am not convinced that investment tribunals would recognise EU law as a relevant issue in investment arbitration and thus refer questions concerning the interpretation and/or validity of EU law for reference to the CJEU. The practice of arbitral tribunals clearly demonstrates that they had so far little regard for EU law. They have held that there is no EU rule which would prevent Member States from resolving their disputes with investors from other Member States by arbitration.[117] On that basis, no investment tribunal, pre- or post-*Achmea*, has ever upheld the intra-EU jurisdictional objection.[118] Moreover, investment tribunals claimed that there is no EU rule which would prevent arbitral tribunals from applying EU law to intra-EU disputes.[119] Some tribunals went as far as to deny "interpretative monopoly" of the CJEU.[120] It is now clear that such reasoning disregards the autonomy of EU law.

[112] Court of Justice, judgment of 15 March 2017, case C-3/16, *Aquino*, para. 42; judgment of 4 October 2018, case C-416/17, *European Commission v. France*, para. 108.

[113] In *European Commission v. France*, cit., the Court of Justice has recently condemned France for the fact that the French *Conseil d'Etat* did not refer questions for preliminary ruling.

[114] Court of Justice: judgment of 20 September 2003, case C-224/01, *Köbler*; judgment of 13 June 2006, case C-173/03, *Traghetti del Mediterraneo*.

[115] Court of Justice, judgment of 27 February 2018, case C-64/16, *Associação Sindical dos Juízes Portugueses*, para. 36.

[116] To that effect see, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG and Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG and Co. KG*, cit., para. 14.

[117] For example, *Achmea B.V. v. The Slovak Republic*, cit., para. 274.

[118] See the comment of tribunal in *RREEF v. Spain*, cit., para. 89 for pre-*Achmea* awards. For a summary of post-*Achmea* considerations of intra-EU objection, see *Vattenfall II*, cit. (for the ECT context), and *UP v. Hungary*, cit. (for intra-EU BIT context under ICSID).

[119] *Electrabel v. Hungary*, cit., para. 4.147; *Charanne and Construction Investments v. Spain*, cit., paras 438, 443-445; *Eiser v. Spain*, cit., para. 204; *Novenergia v. Spain*, cit., para. 440. For example, tribunal

IV. Who fragments what?

Ms Icsid: However, arbitral tribunals were also clear that their jurisdiction only concerns breaches of an international investment treaty, whether an intra-EU BIT or the ECT, and not of EU law. Therefore, their role is not to give an "authoritative interpretation of EU law"[121] which would be binding on Member States or the EU, but to interpret an international agreement in question.[122] In this sense, EU law in investment arbitration has been mostly treated as a matter of international law[123] or as a matter of fact.[124] In cases where EU law has been raised as a relevant issue in intra-EU arbitration, arbitral tribunals have generally attempted to interpret the obligations of Member States under the international treaty harmoniously with EU law, in light of the principle of systemic integration in general international law.[125] Investment tribunals have not found any material inconsistency between EU law and international investment law, neither with respect to jurisdictional issues related to ISDS mechanism nor substantive issues related to investment protections guaranteed in investment agreements.[126] It is the EU, firstly the Commission and then the CJEU, that sparked off a debate of unprecedented nature between EU law and investment law, and not *vice versa*.

Professor Van Gend en Loos: Given the objectives of EU law as explained so far, the relationship between EU law and investment law should not be understood in terms of conflict. Both regimes share the aim of guaranteeing investment protections, the only difference is in the leeway given to regulatory powers of the State under each regime. In any case, any limitations on economic freedoms within the EU, which might infringe investors' rights, must be proportionate and justified by reason of public policy.[127] In *Achmea,* the CJEU conclusively resolved the inconsistency between EU law and international investment law with respect to jurisdictional issues. The CJEU did not find necessary to tackle any potential substantive issues and it did not discuss whether ISDS

considered EU law as part of domestic law in ICSID, award of 13 November 2000, case no. ARB/97/7, *Emilio Agustín Maffezini v. The Kingdom of Spain*, para. 69.

[120] *Achmea B.V. v. The Slovak Republic*, cit., para. 282.

[121] *Ibid*.

[122] P. Strik, S*haping the Single European Market in the Field of Foreign Direct Investment*, Cambridge: Cambridge University Press, 2014, p. 259.

[123] *Achmea B.V. v. The Slovak Republic*, cit., para. 283; *Electrabel v. Hungary*, cit., para. 4.122.

[124] ICSID, final award of 11 December 2013, case no. ARB/05/20, *Micula and Others v. Romania* (*2013 Micula v. Romania*), para. 328.

[125] Art. 31, para. 3, let. c), VCLT. See, for example, *Electrabel v. Hungary*, cit., para. 4.130; *RREEF v. Spain*, cit., para. 76; *2013 Micula v. Romania*, cit., paras 326-327.

[126] *Electrabel v. Hungary*, cit., para. 4.146; *Charanne and Construction Investments v. Spain*, cit., para. 438; *RREEF v. Spain*, cit., para. 79; *Eiser v. Spain*, cit., para. 199; *Novenergia v. Spain*, cit., paras 438-442.

[127] S. De Vries, *Tensions Within the Internal Market*, Groningen: Europa Law Publishing, 2006, pp. 49-96.

clause leads to substantive inconsistencies, such as discrimination under Art. 18 TFEU. Furthermore, ISDS outside the intra-EU context has not been questioned by the CJEU.

Ms Icsid: However, it cannot be ignored that a number of intra-EU arbitrations do not concern issues of EU law at all but policy areas in which Member States enjoy, if not exclusive competence then a wide discretion in policy making. For example, in *Vattenfall II*, the Swedish energy company Vattenfall challenged under the ECT the German decision to phase out nuclear energy in reaction to the 2011 Fukushima nuclear incident. Germany fully exercised its policy discretion in deciding to close the nuclear plants since nothing in EU law obliged it to do so. And since such decision falls squarely within the domestic powers of Germany, the investor has no guarantees under EU law.

Furthermore, following *Achmea*, international investment tribunals would not have jurisdiction for such intra-EU arbitration although intra-EU jurisdiction has not even been raised in this case prior to the *Achmea* judgment. Therefore, Art. 344 TFEU should be understood to apply only to intra-EU investment disputes which might in their *merits* stage involve a conflict between EU law and international investment law with respect to substantive issues. This could indeed lead to a possibility of an investment tribunal interpreting EU law. However, Art. 344 TFEU should not be applicable to preclude the *jurisdiction* of investment tribunals in *all* intra-EU cases, and in particular not in those cases which do not involve the possibility of divergent interpretation of investors' substantive protections under EU law.[128]

Professor Van Gend en Loos: EU law is the relevant law for the interpretation of the international investment agreement involving two EU Member States as a matter of international law. By virtue of Art. 31, para. 3, let. c), VCLT, any investment tribunal would need to apply the *Achmea* judgment as a "relevant rule of international law applicable in the relations between the parties" when interpreting all clauses of an intra-EU BIT, including its ISDS clause. As a matter of fact, determining the jurisdiction of investment tribunals is the first step in any investment arbitration and, naturally, this step precedes the merits stage of the dispute. The tribunal would thus find that EU law applies directly to its jurisdiction in accordance with the BIT at issue, thereby declaring the ISDS clause inapplicable. In the same manner, when interpreting the ISDS clause in Art. 26 ECT in a dispute involving an investor from one Member State against another Member State, the investment tribunal should take into account the *Achmea* judgment and accordingly decline its jurisdiction. *Achmea* applies as a relevant rule of international law to all intra-EU situations, regardless of whether they involve any other substantive issues of EU law relevant for the merits of the claim. In the absence of investment tribunals' jurisdiction, these issues become irrelevant. In all intra-EU investment cases, even those that fall squarely within domestic powers of a Member State, investors' rights are guaranteed under EU law since

[128] *Antin v. Spain*, cit., para. 228 (emphasis added).

Member States' domestic legal orders in all cases must comply with fundamental principles and rights guaranteed in the founding Treaties and the EU Charter.

Ms Icsid: Such an approach is jeopardising the consistency of international investment law and contradicts the principle of relative effect of treaties enshrined in Art. 30 VCLT. It is particularly problematic in the multilateral context of the ECT. On the one hand, the ECT ISDS clause should not be applicable in intra-EU disputes. On the other hand, the same clause should continue to apply between third non-EU States and in extra-EU context between EU Member States and third States. If tribunals take *Achmea* as the relevant rule of international law applicable in intra-EU relations for the interpretation of the ECT, and do not apply the same rule in extra-EU relations, this would result in the fragmentation of the ECT.[129] Consequently, we would end up with a dual regime under the same agreement, one favouring respondent States in the intra-EU context, the other favouring investors litigating against host States in the extra-EU and non-EU context. This would indeed undermine the multilateralism to which the EU so much aspires.[130]

Professor Van Gend en Loos: It is undisputable that international investment law is one of the most fragmented areas of international law, much worse than environmental law or fundamental rights law, to say the least. The profusion of investment agreements with 2,361 different treaties currently in force, is indeed astonishing.[131] The mere fact that the ECT provides for a specific regime, albeit a multilateral one, compounds the fragmentation of international law. Different *ad hoc* investment tribunals adjudicate investment claims according to the provisions of the specific investment treaty establishing these tribunals, whether a BIT or the ECT. Furthermore, there is no central authority harmonising their jurisprudence. Specific differences between treaties are often used as a justification for departing from earlier practice. Even appreciations of the *Achmea* judgment differ between different tribunals guided by the same procedural rules.[132] On the other hand, and unlike investment law which reckons to a great extent upon a bilateral approach, the EU favours a multilateral approach and a *jus commune* that applies to its 28 Member States. The CJEU is the sole court to rule on all EU legal matters and it is doing its very best to streamline its case-law for the sake of consistency. The case-law on the freedom of establishment is a case in point. All guiding principles have been set-

[129] *Vatenfall II*, cit., para. 158.

[130] In that sense, the principle of autonomy could lead to further fragmentation and a disconnection between EU law and international law, as claimed by C. HILLION, R.A. WESSEL, *The European Union and International Dispute Settlement: Mapping Principles and Conditions*, in M. CREMONA, A. THIES, R.A. WESSEL (eds), *The European Union and International Dispute Settlement*, cit., p. 21.

[131] UNCTAD, *Investment Policy Hub*, cit.

[132] Compare for example, ICSID, award of 25 July 2018, case no. ARB/12/39, *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, paras 75-81; and *Vattenfall II*, cit., para. 46.

tled in the Seventies.[133] Domestic courts feel comfortable in adjudicating disputes in light of the CJEU's settled case-law.

Ms Icsid: However, if the EU founding Treaties have created a "municipal legal order of trans-national dimensions",[134] whereby the founding Treaties are its "basic constitutional charter",[135] any Member States' duties under EU law should rather be understood as domestic law obligations, which cannot serve as justification for the Member States' failure to perform an international treaty obligation.[136] After all, *pacta sunt servanda*![137]

In addition, in the context of the ECT, the EU and its Member States did not include an explicit disconnection clause, which would have ensured that EU law governs relations between Member States *inter se* to the extent that a subject matter is covered by EU law, while the ECT governs the obligations between EU Member States and non-EU ECT parties.[138] Such clause would have ensured that Member States' obligations under the ECT do not hamper the implementation of EU law, while preserving legal certainty towards third parties. As the tribunal in *Eiser* well noted, the "ECT's ordinary meaning" cannot be disregarded "in order to exclude a potentially significant body of claims".[139] After all, "[i]t is a fundamental rule of international law that treaties are to be interpreted in good faith. As a corollary, treaty makers should be understood to carry out their function in good faith, and not to lay traps for the unwary with hidden meanings and sweeping implied exclusions".[140]

IV.1. The peculiar case of the ECT again: fragmentation or integration?

Professor Van Gend en Loos: In the context of the ECT, the character of the EU as a regional economic integration organisation (REIO) cannot be ignored, including the fact that energy integration in the EU single market has been *work in progress* since the beginning of the ECT, ultimately serving the interests of investors.[141] A disconnection clause can be implied in the text of the ECT in the context of these developments. In particular, an investment by an investor from one EU Member State in the area of an-

[133] C. Barnard, *The Substantive Law of the EU*, Oxford: Oxford University Press, 2010, p. 295.

[134] See opinion of AG Poiares Maduro, *Kadi*, cit., para. 21.

[135] Court of Justice, judgment of 23 April 1986, case 294/83, *Les Verts*, para. 23.

[136] Art. 27 VCLT.

[137] See the comment of the tribunal in *RREEF v. Spain*, cit., para. 85.

[138] See International Law Commission, *Fragmentation of International Law*, cit., paras 289-294.

[139] *Eiser v. Spain*, cit., para. 186. According to UNCTAD database, of 119 ECT cases, 76 are intra-EU investment disputes: UNCTAD, *Investment Policy Hub*, cit.

[140] *Eiser v. Spain*, cit., para. 186.

[141] While at the time of the conclusion of the ECT the common EU energy market was not yet established, in the meantime, the EU internal energy market has been profoundly transformed, with a number of secondary regulatory measures being adopted: see L. Hancher, P. Larouche, *The Coming of Age of EU Regulation of Network Industries and Services of General Economic Interest*, in P. Craig, G. de Búrca (eds), *The Evolution of EU Law*, Oxford: Oxford University Press, 2011, pp. 752-756.

other EU Member State is made within the "area" of the EU as a REIO, which is the area belonging to the same contracting party even when it involves two different EU Member States.[142] Consequently, the EU's offer to arbitrate in the Art. 26 ECT is only made to investors from non-EU Member States, thus eliminating the EU Member States' individual standing as respondents under the ECT.[143] From the very beginning, the EU was clear that the ultimate power to issue rulings on EU law in intra-EU ISDS procedures under the ECT should remain with the CJEU.[144]

Ms Icsid: Legal certainty requires that any relevant rule of international law, that is to be taken into account for interpretation, must be clear.[145] If it was intended that the offer to arbitrate in Art. 26 ECT was only made to investors from non-EU Member States, it would have been necessary to include such an arrangement in an explicit language in the ECT.[146] After all, the ECT is "the constitution" of the ECT tribunals and they therefore, must ensure "the full application" of that agreement.[147] Their jurisdiction is derived from the *express* terms of the ECT. Investment tribunals are not institutions of the EU legal order, as the CJEU confirmed in its *Achmea* judgment. Therefore, they are not subject to the requirements of that legal order.[148] The EU has only indicated in its Statement to the ECT Secretariat that the CJEU is "competent to examine" any question relating to the application and interpretation of international agreements concluded by the EU (e.g. the ECT).[149] This does not include the *exclusive* jurisdiction of the CJEU to interpret the ECT.[150]

Professor Van Gend en Loos: The ECT, as an international agreement to which the EU is a party, is part of the EU legal order. In this sense, the CJEU has an exclusive competence to interpret the ECT as a matter of EU law, either when examining the compliance of an EU act with EU law or on the basis of a request for a preliminary ruling under Art. 267 TFEU. This was the reason why the consent to the submission of a dispute to international arbi-

[142] In this regard, see the definition of a "Contracting Party" in Art. 1, para. 2, ECT, the definition of a "REIO" in Art. 1, para. 3, ECT, and the definition of "Area" with respect to a REIO in Art. 1, para. 10, ECT.

[143] See *Vattenfall II*, cit., para. 179, citing Commission's submission to the tribunal. See also Spain's arguments, for example in *Charanne and Construction Investments v. Spain*, cit., paras 214-219; *Eiser v. Spain*, cit., para. 161 *et seq.*; *Novenergia v. Spain*, cit., para. 404 *et seq.*; *Antin v. Spain*, cit., para. 161 *et seq.*

[144] To this effect, see Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Art. 26(3)(b)(ii) of the ECT, para. 4.

[145] *Vattenfall II*, cit., para. 164.

[146] *Ibid.*, paras 182, 188 and 202; *Eiser v. Spain*, cit., paras 194-195; *Charanne and Construction Investments v. Spain*, cit., para. 430; *Novenergia v. Spain*, cit., para. 453.

[147] *RREEF v. Spain*, cit., paras 74-75.

[148] *Eiser v. Spain*, cit., para. 199.

[149] *Vattenfall II*, cit., para. 190, citing Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Art. 26(3)(b)(ii) of the ECT (1998), para. 4.

[150] *Vattenfall II*, cit., para. 190 (emphasis added).

tration in cases of disputes involving the "application of the forms of action provided by the constituent Treaties of the Communities" was not given unconditionally.[151]

Ms Icsid: If it was intended that intra-EU arbitration would not be available to investors, such an intention should have been made explicit through a disconnection clause in the ECT or through the adoption of a supplementary instrument.[152] Moreover, as correctly noted by the *Vattenfall II* tribunal, the *travaux préparatoires* of the ECT reveal that during the negotiation of the ECT, the EU had proposed the insertion of a disconnection clause, which was however ultimately dropped from the draft treaty. In light of that, the tribunal "could only conclude that a disconnection clause was intentionally omitted from the ECT".[153] The absence of such a clause can indeed indicate that the ECT was *intended* to create obligations between Member States of the EU, including in respect of ISDS,[154] and not *vice versa*. Equally, investment tribunals cannot extrapolate from *Achmea* a new rule of international law, which would render an ISDS clause in the ECT intra-EU relations inapplicable if this is not clearly stated in that judgment.[155] And in any case, as already explained, Art. 16 ECT prohibits the terms of another agreement to be construed as to derogate from the investor's right to ISDS under the ECT.[156]

In light of all these circumstances, the only way for the EU and its Member States to resolve this uncertainty is to amend the ECT with the effect of excluding arbitration in intra-EU disputes and replacing it by EU law and its dispute settlement.[157] To the best of my knowledge, there have been no such attempts on the EU side so far.

[151] Statement submitted by the European Communities to the Secretariat of the Energy Charter pursuant to Art. 26(3)(b)(ii) of the ECT (1998), para. 5.

[152] *Vattenfall II*, cit., para. 202. For example, potential conflicts between the ECT and the Svalbard Treaty have been explicitly excluded from the operation of Art. 16 ECT: see Final Act of the European Energy Charter Conference, Annex 2.

[153] *Vattenfall II*, cit., para. 206.

[154] *Ibid.*, paras 205-206.

[155] *Ibid.*, paras 164-167.

[156] See discussion *supra*, section II.3.

[157] A disconnection clause would have limited effect if extra-EU ISDS disputes are also not properly addressed: see *RREEF v. Spain,* cit., paras 51-52; A. DELGADO CASTELEIRO, *Disconnecting from the Energy Charter Treaty: Disconnection Clauses and Normative Conflicts Between European Union Law and the Energy Charter*, in A. DIMOPOULOS (ed.), *The EU and Investment Arbitration Under the Energy Charter Treaty*, Cambridge: Cambridge University Press, forthcoming, pp. 18-22. An amendment to the ECT would require the consent of the 3/4 of the Contracting Parties under Art. 42 ECT. As the EU and its Member States constitute only a half of all Contracting Parties, they would need to reach a political agreement with other non-EU Contracting Parties, which might be difficult if the asymmetrical effects of the autonomy of EU law on protection of their investors in issues concerning EU law are also not addressed (see *infra*, section IV.2). A reservation in the context of Art. 46 ECT, which precludes reservations running contrary to the intent of the Contracting Parties to have the ECT unconditionally and integrally applied by all Parties, would also be problematic.

Professor Van Gend en Loos: Undoubtedly, in its intra-EU aspect, ISDS provision of the ECT must be brought in line with EU law, excluding intra-EU arbitration. Given that the ECT is part of the EU legal order, it should be brought to conformity with primary law also for the purpose of legal certainty. In the meantime, it is likely that the CJEU will soon have an opportunity to rule on the compatibility of the intra-EU disputes under the ECT with EU law, which should then conclusively resolve the controversy of *Achmea*'s applicability in the ECT context.[158] And it is more than likely that such judgment will be in line with the CJEU's reasoning in *Achmea* rendering intra-EU arbitration under the ECT inapplicable. With respect to the future of the ECT, it is likely that *Achmea* does not mark the end of the ECT for the EU and its Member States, despite Italy's withdrawal, but an end of its hybrid intra and extra-EU character and thus a continuation of the EU's new ECT chapter which focuses on a broader global strategy.[159]

IV.2. Why is intra-EU context different to extra-EU?

Ms Icsid: The Commission has interpreted *Achmea* as applying to intra-EU context only.[160] However, although *Achmea* concerned an investment treaty concluded between two Member States, the implications of this judgment could reach far beyond internal EU agreements. Many commentators believe that, in light of *Achmea*, the issue of extra-EU BITs remains unclear.[161] Reasoning by analogy, EU law forms part of the Member States' domestic legal order and potential conflicts with EU law cannot be avoided. Given the level of abstraction applied by the CJEU, whereby the Court assessed as a threat to the autonomy of EU law all intra-EU disputes, even when they do not deal with issues of EU law, it is difficult to see how investment arbitration under extra-EU BITs would not give rise to the same abstract concerns regarding the interpretation of EU law. In fact, the ISDS mechanism in BITs concluded between Member States and third countries could also violate Arts 267 and 344 TFEU where the arbitral jurisdiction concerns either the application or the interpretation of EU law. If under an extra-EU BIT or the ECT, an investor from a non-EU State challenges a measure which a Member State adopted to comply with its EU obligations, in such a case the investment tribunal established under that treaty could also interpret EU law, challenging its autonomy. Would the CJEU then also rule that in all such cases the jurisdiction of investment tribunals should be exclud-

[158] Arbitral Tribunal of Stockholm Chamber of Commerce, decision of the Svea Court of Appeals suspending the enforcement of the award until further notice of 16 May 2018, *Novenergia v. Spain*, cit.

[159] See European Parliamentary Research Service, *Energy Charter: A Multilateral Process for Managing Commercial Energy Relations*, July 2017, www.europarl.europa.eu.

[160] Communication COM(2018) 547, pp. 3-4.

[161] See, for example, S. Gáspár-Szilágyi, *It Is not Just About Investor-State Arbitration: A Look at Case C-284/16, Achmea BV*, in *European Papers*, 2018, Vol. 3, No 1, europeanpapers.eu, p. 357 *et seq.;* L. Ankersmit, *Achmea: The Beginning of the End for ISDS in and with Europe*, in *Investment Treaty News*, 24 April 2018, www.iisd.org.

ed? In particular, what if such a BIT expressly stated that the tribunal should, *inter alia*, decide the case on the basis of domestic law?

Professor Van Gend en Loos: Indeed, if one reads *Achmea* broadly, potentially any dispute settlement mechanism outside the EU judicial system might involve the interpretation or application of EU law.[162] However, *Achmea* could be also read as applying only to those cases which not only violate Arts 267 and 344 TFEU but also undermine the principles of mutual trust and sincere cooperation, enshrined in Art. 19, para. 1, and Art. 4, para. 3, TEU respectively. Indeed, these principles could be understood as the core elements of the *Achmea* judgment,[163] which play an important role in the intra-EU context but are not relevant for extra-EU relations.

The principle of mutual trust between Member States mandates that Member States "provide remedies sufficient to ensure effective legal protection in the fields covered by Union law" and by doing so recognise in their domestic legal systems "common values on which the EU is founded, as stated in Art. 2 TEU" and thus ensure that the law of the EU that implements these common values will be respected in their territories.[164] Although this principle plays an important role in the Area of Freedom, Security and Justice, its contribution expands beyond that, to the extent that it has become a structural principle of EU law.[165] In relation to mutual trust, the principle of sincere cooperation requires the Member States to "assist each other" in fulfilling their obligations under EU law in "full mutual respect". In particular, they are called on to take "any appropriate measures" to ensure the correct implementation of EU law or to refrain from "any measure which could jeopardise the attainment of the Union's objectives".[166]

Intra-EU arbitration, which fragments the internal market, must be understood in this context. In other words, it is logical that *inter se* international agreements of EU Member States are subject to the requirements of primacy and effectiveness in the same manner as domestic laws.[167] EU Member States could not be permitted to diverge from internal market rules by an international treaty any more than they could by domestic legislation.

Ms Icsid: Indeed, an interpretation of *Achmea* that would render ISDS illegal in all extra-EU BITs could lead to problems in the relations between the Member States and third countries. Member States still have 1138 extra-EU treaties in force.[168] The prohibition of

[162] N. DE SADELEER, *The End of the Game*, cit., p. 367.

[163] See opinion of AG Bot delivered on 29 January 2019, opinion 1/17, paras 105 and 112.

[164] *Achmea* [GC], cit., para. 34.

[165] S. PRECHAL, *Mutual Trust Before the Court of Justice of the European Union*, in *European Papers*, 2017, Vol. 2, No 1, europeanpapers.eu, p. 75 *et seq*.

[166] Art. 4, para. 3, TEU.

[167] E.g. Court of Justice, judgment of 27 September 1988, case C-235/87, *Matteucci*, paras 19-22.

[168] UNCTAD, *Investment Policy Hub*, cit.

ISDS clauses in these extra-EU BITs could compound asymmetry with third countries. In other words, EU investors could be protected in third countries, but third country investors would not receive similar protection in the EU in any case involving an EU measure that is being implemented in national law. By way of illustration, a Belgian investor in China could initiate proceedings against the host State before an ISDS, given that EU law is inapplicable. However, a Chinese investor in Belgium would be unable to avail itself of the same right on the grounds that the tribunal could interpret and apply EU law.[169]

Professor Van Gend en Loos: ISDS provision of the ECT as well as similar provisions in extra-EU BITs can remain applicable under Art. 351 TFEU as long as they do not conflict with EU law, with the exclusion of cases which concern EU measures or national measures implementing EU law. An investment tribunal could always argue that ISDS cannot be excluded on the ground that the case does not concern either the application or the interpretation of EU law as the subject-matter has not been harmonised. Considering the sheer breath of EU harmonisation in the energy, transport, industrial, agricultural, trade in goods and in services and financial services sectors, this would be a mere theoretical hypothesis. However, the situation with these external agreements is perhaps less critical as their ability to undermine the principles of mutual trust and sincere cooperation, and thus the autonomy of the EU legal order, is less imminent.

Finally, considering the changes that have been made to Art. 207 TFEU, these extra-EU BITs will eventually disappear as the EU concludes new investment treaties with third countries.[170] Currently, the EU is negotiating investment agreements with India, Indonesia, Japan, Malaysia, Mexico, China and Myanmar. Indeed, once concluded, these bilateral treaties will prevail over the former extra-EU BITs.

V. Why autonomy matters?

Ms Icsid: Whether we talk about international agreements in general, or investment agreements in particular – bilateral, multilateral, intra-EU, extra-EU, those to which the EU is a party or Member States are parties – we always return to the issue of autonomy of EU law. Autonomy seems to be a *leitmotif* of the EU's relationship with international investment law. But why should autonomy of EU law matter to anyone but the EU itself?

Professor Van Gend en Loos: Autonomy matters for several reasons and its importance is not limited exclusively to the EU. Autonomy is important in defining the relationship between EU law and international law. In the context of international investment law, it is not only relevant for the normative relationship between international law and EU

[169] Belgium – China BIT of 6 June 2005. See N. de Sadeleer, *The End of the Game*, cit., p. 368.

[170] Preamble, n. 5, of the Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries.

law but also for defining the relationship between the CJEU and other international courts. Secondly, autonomy matters for the Member States as it ensures the attainment of the Union's objectives, which ultimately serve the interests of Member States and all their subjects. Finally, autonomy of EU law matters for investors too, for practical reasons of enforcement of investment awards.

V.1 It matters for EU relationship with international courts

Ms Icsid: Potentially any dispute settlement mechanism placed outside the EU judicial system could involve the interpretation or application of EU law. In light of the CJEU's concerns for the autonomy of EU law, as expressed in *Achmea*, could the proposed Investor Court System (ICS) in Comprehensive Economic and Trade Agreement (CETA) and, similarly, a future multilateral investment court, in the same manner as ISDS, be problematic for the autonomy of the EU legal order?

Professor Van Gend en Loos: The conclusion of several agreements setting up adjudicating bodies sitting outside the institutional and judicial framework of the EU, with jurisdiction in respect of EU law (e.g. EU patents) raised the issue of preserving the autonomy of the EU legal order and court system. The CJEU's case-law offers guidelines with respect to the compatibility of a new court with EU law. Importantly, the Court has declared that an international agreement may affect its own powers provided that the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal order.[171] These agreements were designed, in essence, to resolve disputes on the interpretation or application of the actual provisions of the international agreements concerned.

In accepting the compatibility of external courts with the EU legal order, the CJEU endorses a three-pronged approach. In so doing, the Court strikes a balance between "the international derivation and the specificity of EU law".[172]

Firstly, the external court can interpret and apply exclusively the provisions of the agreement at issue. It follows that the autonomy of the EU would be compromised when the international court which has jurisdiction in relation to the interpretation and application of the agreement, may be called upon to interpret EU law.[173]

Secondly, as a result of the first premise, the external court should not be conferred the competence to interpret authoritatively one way or another EU law. For instance, the autonomy will be affected when the envisioned court is likely to deprive the domes-

[171] Court of Justice: opinion 1/00 of 18 April 2002, *Agreement on the Creation of European Common Aviation Area*, paras 21, 23 and 26; opinion 1/91, cit., para. 30; opinion 2/13, cit., para. 183.

[172] K. Lenaerts, *Droit international et monisme de l'ordre juridique de l'Union*, in *Revue de la Faculté de droit de l'Université de Liège*, 2010, p. 506.

[173] Opinion 1/00, cit., para. 2.

tic courts of the power to request preliminary rulings from the CJEU in the field covered by the agreement.[174]

Thirdly, the agreement cannot affect the jurisdiction of the CJEU to adjudicate disputes between Member States in accordance with Art. 344 TFEU.

In case one of these conditions is not fulfilled, the EU cannot conclude an agreement allowing the EU to be a party to an external court, even though the founding Treaties allow, or even oblige, as in the case of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the conclusion of such an agreement.[175] Against this background, the CJEU held that several draft agreements were liable to upset the underlying balance of the EU and undermine the autonomy of EU law.[176] Of course, one could criticize the Court for adopting "an absolute and maximalist vision of the impenetrability of EU and international law".[177]

However, "[i]t is for the Court to ensure respect for the autonomy of the EU legal order thus created by the Treaties"[178] and the CJEU will ultimately assess the compatibility of the new investment dispute settlement mechanism in light of all these criteria.[179]

V.2. It matters for EU integration

Ms Icsid: The CJEU has played a pivotal role in carving out the autonomy of EU. In asserting that EU law is autonomous from international law, the CJEU insulates this legal order from international law. However, all this is causing great difficulties for EU Member States. The EU requires from its Member States to dishonour their international law obligations in order to comply with their EU legal obligations. Needless to say, the *Kadi and Al Barakaat* judgment[180] highlights the extent to which EU law trumps international law. The CJEU's vision of human rights standards with respect to restrictive measures imposed upon terrorists prevails over the obligations placed on the 28 Member States under UN law. However, there is no customary international law rule that favours EU integration over international law.

Professor Van Gend en Loos: That said, I could also claim that other legal orders trump EU law. For instance, Belgium was condemned by the European Court of Human Rights for breaching Art. 3 ECHR on the grounds that asylum seekers were sent back to Greece

[174] *Ibid.*, para. 79; opinion 1/09, cit., para. 77.

[175] Opinion 2/13, cit., para. 182.

[176] *Ibid.*, para. 194.

[177] N. Jääskinen, A. Sikora, *The Exclusive Jurisdiction of the Court of Justice of the EU and the Unity of the EU Legal Order*, in M. Cremona, A. Thies, R.A. Wessel (eds), *The European Union and International Dispute Settlement*, cit., p. 106.

[178] Opinion 1/00, cit., para. 67.

[179] Opinion of AG Bot, opinion 1/17, cit., paras 115 *et seq.*

[180] In *Kadi*, the CJEU held that that "an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system": *Kadi*, cit., para. 282.

whilst that country did not correctly implement the Dublin II Regulation.[181] In so doing, the European Court of Human Rights indirectly reviewed the legality of an EU act in light of the ECHR.

Undoubtedly, the *sui generis* nature of EU legal order upsets international lawyers, including international investment arbitrators. However, without tools that defend the autonomy of the EU legal order, the EU project would be seriously hampered. The EU in 21st century touches upon a wide number of issues of international importance, whereby EU rules overlap with international standards. The main objective of the autonomy of EU law is not to depart from international standards (and indeed in many cases, EU standards are more comprehensive than international ones), but to ensure that these standards do not impede the implementation of EU law and thus ultimately hinder the EU integration. The attainment of the EU objectives requires that the rules of EU law are "fully applicable at the same time and with identical effects over the whole territory of the Community without the Member States being able to place any obstacles in the way".[182] Intra-EU arbitration could clearly be considered such an obstacle. As clarified by AG Bot, "by means of a bilateral investment agreement, two Member States had agreed to *remove* EU law from the jurisdiction of their own courts, and therefore from the judicial dialogue between those courts and tribunals and the [CJEU], which was capable of having an adverse effect on the *uniformity* and effectiveness of EU law".[183] Differentiation between the Member States due to international law mechanisms may indeed be a factor in the disintegration of the EU.[184] After all, it's all about EU integration!

Ms Icsid: I still do not see how the achievement of such an abstract goal should in any way matter to foreign investors in the EU. Investors are interested in obtaining full protection of their rights, and not in achieving the political goals of the EU integration.

V.3. It matters for practical reasons of enforcement

Professor Van Gend en Loos: The autonomy of EU law should greatly matter to investors. The consequences could be serious given that the domestic courts in the EU will not be able to enforce the awards. Indeed, in case of a conflict between EU law and the BIT, the ECT or the ICSID Convention, the national courts are called on to disapply the latter. Accordingly, investment tribunals should act responsibly towards investors and decline jurisdiction for intra-EU disputes knowing that their awards cannot be enforced in the EU.

[181] European Court of Human Rights, judgment of 21 January 2011, no. 30696/09, *Nous*.

[182] Court of Justice, judgment of 13 July 1972, case C-48/71, *European Commission v. Italy*, para. 8.

[183] Opinion of AG Bot, opinion 1/17, cit., para. 105 (emphasis added).

[184] B. de Witte, *Variable Geometry and Differentiation as Structural Features of the EU Legal Order*, in B. de Witte, A. Ott, E. Vos (eds), *Between Flexibility and Disintegration. The Trajectory of Differentiation in EU Law*, Cheltenham: Edward Elgar Publishing, 2017, p. 26.

Ms Icsid: Investment tribunals are "mindful of the duty to render an enforceable decision and ultimately an enforceable award" but they are "equally conscious" of their duty to perform their mandate granted under the particular investment agreement.[185] Investment tribunals' jurisdiction concerns the breaches of that particular treaty and the responsibility of States towards investors under international law. They are "not concerned" with breaches of EU law stemming from Member States' participation in intra-EU arbitrations.[186] Surely, ICSID awards, which are not subject to domestic judicial review can be enforced, even in the EU.[187] In any case, if not in the EU, all awards can be enforced outside the EU.

Professor Van Gend en Loos: All awards can still be challenged in the execution phase, even ICSID awards. While the ICSID Convention indeed states that any award of an ICSID tribunal shall be binding and will not be subject to any domestic remedy, the Convention also provides that the execution of any such award "shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought".[188] It should not be forgotten that the EU is not a party to the ICSID Convention, although almost all of its Member States are. Therefore, the ICSID Convention is not part of the EU legal order and does not prevail over EU law in domestic legal orders of the Member States. Accordingly, the Member State national court is obliged to refuse the execution of an intra-EU ICSID award, regardless of the Member State's membership to the ICSID Convention. Such awards could therefore only be enforced in non-EU States, subject to the availability of respondent EU Member State's assets that could be seized in the third State in which the enforcement has been sought. In addition, payment of compensation in certain cases could also amount to an illegal State aid.[189] Therefore, the autonomy of EU law matters for intra-EU investors more than their investment lawyers wish to admit.

VI. Conclusions

Ms Icsid: Based on our discussion, we could agree that international investment law and EU law share similar grounds in international law but address the protection of foreign investors "from different perspectives".[190] The main philosophy of international investment law is unconditionally focused on protection of foreign investors. On the other hand, the highest value of the EU legal order is the integration of its internal market, to which all other goals must conform. With this in view, it therefore does not surprise that

[185] *Vattenfall II*, cit., para. 230.
[186] *Ibid.*, para. 231.
[187] Art. 53 ICSID Convention.
[188] See Art. 54, para. 3, ICSID Convention.
[189] See *supra*, footnote 43.
[190] *Electrabel v. Hungary*, cit., para. 4.177.

the legal reasoning and the methods of interpretation of the CJEU and investment tribunals differ to a significant degree.

The CJEU interprets international law with an aim to ensure "systemic coherence" between primary sources of EU law, which form part of international law, and other sources of international law, in this case international investment agreements. The argument of coherence ultimately serves to achieve stronger integration within the EU.

On the contrary, investment tribunals, while recognising that EU law is international law, have reduced its relevance as international law by refusing to recognise it as a relevant law in the interpretation of investment agreements. Consequently, intra-EU distinction in their view cannot be allowed, as it would lead to the fragmentation, at least in the ECT context.[191]

Ultimately, our discussion reveals the clash between the CJEU's broader teleological and systemic approach in legal reasoning and arbitral tribunals' narrower literal and textual focus in the interpretation of investment agreements, which leaves them frozen in time in which they were adopted. It seems to me that this conflict can only be resolved if the EU and its Member States amend the investment agreements to exclude intra-EU arbitration in all cases. Ultimately, this will ensure greater legal certainty for all investors in the EU.

Professor Van Gend en Loos: However, the solution to intra-EU *clash* of the EU legal order and international investment law should come soon, or we would at least hope, rather soon. On 15 January 2019, the majority of the Member States adopted a declaration by which they "inform the investor community that no new intra-EU investment arbitration proceeding should be initiated".[192] While this is a non-legally binding declaration, it does send a political message to investors since States, as parties to intra-EU investment agreements, declare not to be bound by their mutually expressed obligations. Member States also announced that they would terminate their BITs by a plurilateral treaty, or where more expedient, bilaterally, no later than 6 December 2019.[193] Such treaty should also address the issue of the sunset clauses. It can be expected that a solution for the intra-EU application of the ECT will be a more complex task.[194] The fact that some Member States have not signed this declaration politically complicates the matter further.[195] Nev-

[191] *Vattenfall II*, cit., para. 158.

[192] Declaration of the Representatives of the Governments of the Member States of 15 January 2019 on the legal consequences of the judgment of the Court of Justice in *Achmea* and on investment protection in the European Union, para. 3.

[193] *Ibid.*, paras 5 and 8.

[194] To that effect, see *ibid.*, para. 9.

[195] Sweden, Luxembourg, Malta, Hungary, Finland and Slovenia have not signed the declaration. While these Member States agree on the issue of intra-EU BITs, they disagree on the issue of the applicability of the *Achmea* judgment to intra-EU arbitration under the ECT. Five Member States issued a separate declaration on 16 January (www.regeringen.se) expressing the view that it would be "inappropriate"

ertheless, legally speaking, in light of the *Achmea* judgment, all pending intra-EU arbitrations should be terminated, regardless of the international instrument – intra-EU BITs or the ECT – under which a particular claim has been brought. *Achmea* sends a clear message that ISDS clauses in international investment agreements that contravene TFEU Arts 267 and 344 and the principles of mutual trust and sincere cooperation enshrined in TEU Art. 19, para.1, and Art. 4, para. 3, are invalid under EU law.

Given the importance of the autonomy of the EU legal order, there is nothing surprising or political about the *Achmea* judgment. Indeed, *Achmea* follows the line of the Court's reasoning on the autonomy of EU law expressed in the Court's earlier judgments, including the opinion 2/13 in which the CJEU opposed the EU's accession to the ECHR,[196] and opinion 1/09[197] in which the CJEU opposed the creation of an unified patent court in the framework of the European Patent Convention. The Court ultimately underscored that the ISDS mechanism in intra-EU BITs calls into question the principle of mutual trust between Member States and is thus incompatible with the principle of sincere cooperation, which obliges the Member States to ensure full effectiveness of EU law in their respective territories by taking appropriate measures which will ensure fulfilment of their obligations under EU law.[198]

Achmea reinforces the importance of the autonomy of EU law as a matter of sovereignty, enshrined in the ability of States to assess the compliance of the awards with public policy. In the EU context, the inability of the CJEU to control the compliance of investment awards with EU law through judicial review undermines the authority of the CJEU and, ultimately, questions the autonomy of EU law.

Finally, *Achmea* confirms the crucial role of the concept of autonomy in defining the relationship between EU law and international law. To quote AG Maduro in *Kadi*: "Relationship between international law and the Community legal order is governed by the Community itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community".[199]

Ms Icsid: On the one hand, the EU wishes to eliminate ISDS in intra-EU disputes in order to ensure the attainment of the Union's objectives and protect its legal order. On the other hand, the EU still does not want to completely give up on alternative investment dispute settlement, whether in the form of ISDS in the existing extra-EU BITs or a multilateral investment court in future perspective, as it wishes to afford protection of EU Member States' outward investments in non-EU States. In other words, the EU wants to have its

to make conclusions on the compatibility of EU law with the intra-EU application of the ECT before the CJEU decides on the matter. Hungary issued another declaration (www.kormany.hu) explicitly excluding the applicability of *Achmea* to the intra-EU ECT disputes.

[196] Opinion 2/13, cit.

[197] Opinion 1/09, cit.

[198] *Achmea* [GC], cit., paras 34, 58.

[199] Opinion of AG Poiares Maduro, *Kadi*, cit., para. 24.

cake and eat it. However, the CJEU's judgment in *Achmea* undoubtedly demonstrates that in the issues of investment, EU's internal legal homogeneity has preceded Member States' political heterogeneity. More broadly, this is clearly a welcome development for a stronger EU's global outreach. However, what is the future for foreign investors in Europe?

Professor Van Gend en Loos: One should not be unnecessary dramatic. Investors are afforded substantive protection under both primary and secondary EU law given that the EU legal system provides for a complete system of remedies.[200] Accordingly, they can invoke these provisions before the courts of the host Member State. The domestic court is in principle obliged to make a reference to the CJEU where a question of the interpretation of the Treaty is raised before it.[201] The fact of not referring the questions could give rise to an infringement proceeding in accordance with Art. 258 TFEU[202] and State liability.[203] EU law presumes that all national courts meet the same standards of justice, be it a court in Germany, Ireland, Belgium, Poland or Croatia. The principle of mutual trust implies that there is no second-class justice in the EU and that investors can expect the same level of protection before the courts of any Member State. As a matter of course, this is a topic for another debate.

Ms Icsid: To quote greater international law experts than me: "The ICJ, human rights bodies, a trade regime or a regional exception may each be used for good or ignoble purposes and it should be a matter of debate and evidence and not of abstract 'consistency', as to which institutions should be preferred in a particular situation".[204]

Last but not least, consider, much learned Professor, our investor again. S/he finds new opportunities in another Member State. However, without the possibility to bring its claim to an investment tribunal, our investor might not invest. Without that investment, the host State will not be able to obtain revenues from that project. Without these revenues, the development will not take place in the host State. Less developed Member States will continue to struggle to reach the level of development of their more developed counterparts. As a result, it will take much longer to overcome the challenge of a multi-speed Europe. To overcome such challenge, our Member State might look for more willing third State investors, perhaps from China. Additionally, the lack of BIT protection for their intra-EU investments could prompt some investors to consider restruc-

[200] With respect to foreign direct investment, the fundamental freedoms of the internal market that can be directly invoked before national courts are somewhat intertwined. For instance, regarding the dividing line between the freedom of establishment and the free movement of capital, see Court of Justice, judgment of 6 March 2018, joined cases C-52/16 and C-113/16, *Segro*, para. 49.

[201] *Aquino*, cit., para. 42; *European Commission v. France*, cit., para. 108.

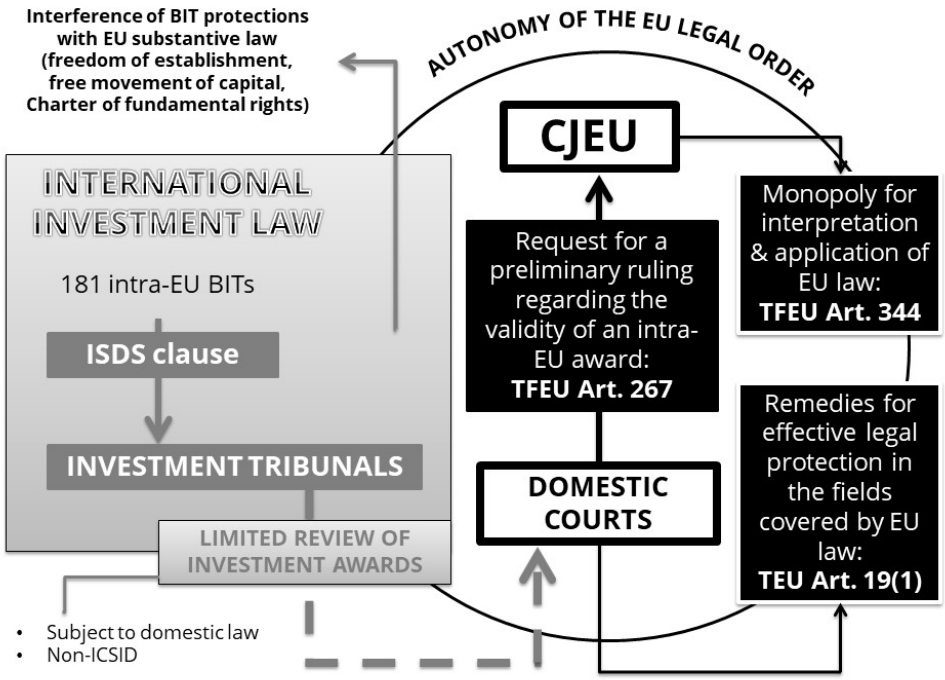
[202] *European Commission v. France*, cit.

[203] *Köbler*, cit.; *Traghetti del Mediterraneo*, cit.

[204] M. KOSKENNIEMI, P. LEINO, *Fragmentation of International Law? Postmodern Anxieties*, in *Leiden Journal of International Law*, 2002, p. 578.

turing their investments through a holding company outside of the EU in order to benefit from extra-EU BIT protections. Imagine what kind of impact could such possible forum shopping have on the legitimacy of investment treaty arbitration, which is at the core of ISDS criticism? Indeed, all this is a topic for another debate.

Nevertheless, having said all that, at any given time, I would rather be an investor claimant before an international investment tribunal than before a domestic court of any of the Member States!



The graph depicts the debate between the two protagonists. It displays the interference of international investment law, and in particular the intra-EU BITs, with the EU legal order. It highlights the difference between the domestic courts called on to provide the remedies for effective legal protection in the fields covered by EU law and the investment tribunals which are precluded from providing such remedies. In brief, the graph explains how and why investment tribunals sit outside the EU legal order.