récemment été confirmé par le Tribunal de grande instance de Paris qui a rappelé que « *l'exigence d'un lien entre le bien saisi avec la demande ayant fait l'objet de la procédure va au-delà des règles du droit international généralement admises* » et constaté que « [c]ette exigence *n'a d'ailleurs pas été reprise dans la loi dite Sapin du 9 décembre 2016* »[22].

Compte tenu de l'enjeu, on peut toutefois s'attendre à ce que la détermination de la commercialité des biens saisis continue de générer un contentieux important.

La Loi Sapin II apporte des éclaircissements utiles à ce sujet. Le nouvel article L. 111-1-2 du Code des procédures civiles d'exécution énumère certains biens « *considérés comme spécifiquement utilisés ou destinés à être utilisés par l'État à des fins de service public non commerciales* », de sorte que tout bien de l'État qui n'apparaît pas dans cette liste devrait en principe être présumé comme « *utilisé ou destiné à être utilisé par ledit État autrement qu'à des fins de service public non commerciales* ». Ces biens, qui se retrouveraient ainsi *a priori* hors du périmètre de l'immunité d'exécution de l'État étranger, devraient donc pouvoir être saisis par ses créanciers.

Controversée lors de l'adoption des dispositions relatives à l'immunité d'exécution des États étrangers[23], la Loi Sapin II n'a pas fini de faire parler d'elle.

p. 139 : « *Le projet de convention qui a été présenté en 1991 à l'Assemblée générale a proposé la formulation suivante (c'est l'article 18) : Aucune mesure de contrainte ne peut être prise contre les biens d'un État "excepté si et dans la mesure où [...] ces biens sont spécifiquement utilisés ou destinés à être utilisés par l'État autrement qu'à des fins de service public non commerciales et sont situés sur le territoire de l'État du for et ont un lien avec la demande qui fait l'objet de la procédure ou avec l'organisme ou l'institution contre lesquels la procédure est engagée". Il y a donc bien, en 1991, cette condition de lien avec la demande. Cette condition est tombée. [...] Cela reflète à mon sens une évolution notable* ».

22. TGI Paris, 9 mai 2017, *Les États-Unis d'Amérique c. Mme Michèle Souiede-Bellelis et autres*, n° 16/83221, p. 10. Ce jugement a été infirmé en appel le 5 avril 2018, sans que la question des immunités soit abordée : v. Paris, 5 avril 2018, n° 17/10051.

23. V. par exemple « Sapin, l'entremis franco-russe », Le Canard enchaîné, 18 mai 2016, qui a qualifié les dispositions relatives aux immunités d'exécution de « cadeau sous le Sapin ».

The Incompatibility of Intra-EU BITs with European Union law, annotation following ECJ, 6 March 2018, Case 284/16, *Slovak Republic v Achmea BV*

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SUMMARY

On 6 March 2018, the Court of Justice of the European Union issued a preliminary ruling of utmost importance for investment arbitration when a Member State of the European Union is concerned.[1] *Although differently interpreted, observers unanimously stress that the ruling leaves unresolved most of the questions it raises and that the ECJ ruling in* Slovak Republic v Achmea BV *is susceptible to have impact on a vast number of pending investment arbitration proceedings.*

The purpose of this commentary is to propose an analysis of both the legal justifications of the ruling and its possible implications. It does not discuss the merits of the system of bilateral investment treaties or of investment arbitration.

RÉSUMÉ

Le 6 mars 2018, la Cour de Justice de l'Union européenne a rendu une décision préjudicielle d'une très grande importance pour l'arbitrage d'investissement lorsqu'un État membre de l'Union européenne est concerné. Bien que différemment interprétée, les observateurs sont unanimes pour remarquer que la décision laisse sans réponse la majorité des questions qu'elle soulève et que la décision de la CJUE dans République Slovaque c/ Achmea BV *est susceptible d'avoir un impact sur un grand nombre de procédures d'arbitrage en cours.*

L'objet de ce commentaire est de proposer une analyse, tant des fondements juridiques de la décision que de ses implications. Celui-ci ne porte pas sur le caractère opportun, ou non, du système des traités bilatéraux d'investissement ou de l'arbitrage d'investissement.

1. ECJ, 6 March 2018, Case C-284/16, *Slovak Republic v Achmea BV* ("Achmea ECJ").

Introduction

On 26 May 2016, the ECJ was requested by the German Federal Court (*Bundesgerichtshof*), in the context of a set aside application against an award rendered by an *ad hoc* arbitral tribunal with its seat in Germany,[2] for a preliminary ruling on issues concerning the compatibility of the arbitration provision included in intra-EU BITs with EU law. The questions were formulated as follows:

> *"(1) Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called intra-EU BIT) under which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the European Union but the arbitral proceedings are not to be brought until after that date?*
> *If Question 1 is to be answered in the negative:*
> *(2) Does Article 267 TFEU preclude the application of such a provision?*
> *If Questions 1 and 2 are to be answered in the negative:*
> *(3) Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?"*

Without answering question (3), the ECJ ruled that: *"Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept."*

The ECJ took position for the first time on a complex issue that has generated abundant arguments in arbitral proceedings and an intense debate between scholars for more than a decade.[3] In sum, the ECJ considered that the arbitration provisions of international treaties for the promotion of investments entered into between EU Member States (intra EU-BITs) are contrary to EU law. 196 intra EU-BITs have been counted, that have generated several arbitral proceedings. Multilateral investments treaties, such as the Energy Charter Treaty, giving rise to arbitral proceedings between a Member State and an investor of another Member State are also susceptible to be concerned by this ruling.

The ECJ's judgment in this case is contrary to the opinion given by advocate general Wathelet on 19 September 2017 who considered, that: *"Articles 18, 267 and 344 TFEU must be interpreted as not precluding the application of an investor/State dispute settlement mechanism established by means of a bilateral investment agreement concluded before the accession of one of the Contracting States to the European Union and providing that an investor from one Contracting State may, in the case of a dispute relating to investments in the other Contracting State, bring proceedings against the latter State before an arbitral tribunal"*.

The 6 March 2018 ruling is not the end of the proceedings, given that the German Federal Court will now have to rule on the application to set aside the award.

The dispute between Achmea BV (formerly Eureko BV) started more than ten years ago, when, after opening the market of private health insurance services in 2004 to foreign investors, the Slovak Republic, decided to revoke such opening two years later. Achmea BV, a Dutch company, which had invested during this short period, initiated investment arbitration proceedings in 2008 against the Slovak Republic on the basis of the agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic (the Netherlands – Slovakia BIT) claiming that the State had violated several of its guarantees.

The Slovak Republic raised an objection to the jurisdiction of the arbitral tribunal arguing that the BIT or at least its arbitration clause was inapplicable due to its accession to the EU. The State based its argument on the provisions of article 59 and article 30 of the Vienna Convention on the Law of the Treaties (VCLT) that regulates the relations between successive treaties relating to the same subject matter. These arguments were dismissed by the arbitral tribunal for many reasons, above all that the BIT and EU law do not deal with the same subject-matter and are thus not incompatible.[4]

Supported by observations submitted by the European Commission, the objection to jurisdiction was further based on the fact that EU law has direct effect over both national law and international treaties and that the ECJ has exclusive jurisdiction to interpret EU law. This objection was also dismissed by the arbitral tribunal which considered that it was bound to apply EU law, as part of the applicable law,[5] and that the monopoly of interpretation of EU law by the ECJ would not be infringed by the application the arbitral tribunal might make of EU law during the merits phase of the arbitration.[6]

Two years later, the arbitral tribunal issued its award on the merits which held that the measures taken by the Slovak Republic were in breach of several provisions of the Netherlands – Slovakia BIT and awarded damages in the amount of euro 22.1 million.[7]

2. Final Award, 7 December 2012, following Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, PCA Case No. 2008-13, *Eureko BV (now Achmea BV) v. The Slovak Republic* (Lowe, van den Berg, Veeder); Rev. arb. 2011, 245, annotation B. Poulain ("Achmea Award on Jurisdiction").

3. See already, E. Teynier, *L'applicabilité des traités bilatéraux sur les investissements entre États membres de l'Union européenne*, Cah. Arb. 2008 (1), p. 28 ; M. Burgstaller, *European Law and Investment Treaties*, Journal of International Arbitration, 2009, 26(2), pp. 181-216 ; C. Kessedjian, Ch. Leben (eds.), *Le droit européen et l'investissement*, Éditions Panthéon-Assas, 2009.

4. Achmea Award on Jurisdiction, §§ 217-277.

5. The arbitral tribunal (§279 of the Achmea Award on Jurisdiction) precisely noted that EU law was applicable by the operation of the arbitration clause itself, article 8(6) of the BIT: *"The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively: the law in force of the Contracting Party concerned; the provisions of this Agreement, and other relevant Agreements between the Contracting Parties; the provisions of special agreements relating to the investment; the general principles of international law"*.

6. Achmea Award on Jurisdiction, §§ 281-283.

7. Final Award, 7 December 2012, CPA Case No. 2008-13, *Achmea BV (formerly known as Eureko BV) v. The Slovak Republic* (Lowe, van den Berg, Veeder).

The Slovak Republic filed an application before the German Courts, firstly to set aside the partial award on jurisdiction. After this application had been rejected by the Court of appeal of Frankfurt and while the proceedings were pending before the German Federal Court, the final award was issued and the first set aside proceedings before the German Courts were terminated. As a consequence, the Slovak Republic filed an application to set aside the final award, which was also rejected by the Court of appeal of Frankfurt.[8] The German Federal Court, although not convinced by the arguments put forward by the Slovak Republic, referred the questions set out above to the ECJ for a preliminary ruling related only to the last objection to jurisdiction raised before the arbitral tribunal.[9] The German Federal Court did so mainly because of the intervention in the proceedings of the European Commission, in support of the set aside application of the Slovak Republic and of the obligation to refer questions arising under EU law to the ECJ.[10]

The ECJ answered the question in a manner contrary to the arbitral tribunal, considering that the arbitration provision of the BIT was contrary to EU law and specifically to article 267 TFEU – which provides for the jurisdiction of the ECJ to give preliminary rulings concerning the interpretation and the application of EU Treaties and EU law in general – as well as article 344 TFEU which provides that *"Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein"*.

The reasoning underlying the ECJ's answer to the preliminary question was that, by choosing a settlement of dispute provision giving jurisdiction to an arbitral tribunal, Member States deprive the ECJ of the possibility of verifying the proper application of EU law by the ECJ, whose task is to *"ensure the full effectiveness of EU law"*[11]. The analysis of the legal reasoning of the ruling (I) will be helpful in trying to determine the effects the Achmea decision may have on investment arbitrations involving EU Member States (II). Both the legal grounds and the impact of the Achmea case remain uncertain.

I. – The uncertain legal grounds of the *Achmea* ruling

It is first of all important to assess the technicalities of the reasoning, noting that the preoccupation put forward by the ECJ is not the possibility for an investment arbitral tribunal to apply EU law, but the absence of the possibility for the ECJ to control the proper application of EU law by the Tribunal. It is therefore not a question of arbitrability of EU law – decided positively many years ago – but rather an issue of controlling the application of EU law by arbitral tribunals (A).

8. OLG Frankfurt, 18 December 2014, *Slovak Republic v Achmea BV*, 26 Sch 3/13.

9. BGH, 3 March 2016, *Slovak Republic v Achmea BV*, quoted above. Issues related to the challenges of jurisdiction based on articles 59 and 30 of the VCLT, not being issues of EU law, were naturally not referred to the ECJ.

10. Article 267 TFEU: "[...]Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Cour"; K. Lenaerts, I. Maselis, K. Gutman, EU Procedural Law, Oxford 2015, §§ 3.43 ff.

11. *Achmea* ECJ, § 56.

Secondly, looking beyond this reasoning, it is interesting to consider what the ultimate goal of the European Institutions might be. If it is the supremacy of EU law over international treaties entered into by Member States, this would raise serious questions about the hierarchy of norms (B).

A. The need to ensure effective control of the application of EU law by arbitral tribunals

In order to ensure *"full effectiveness of EU law"* where arbitration proceedings are concerned there have been three possible approaches: the one taken in *Eco Swiss* (1), the approach of AG Wathelet (2) and that taken by the ECJ in *Achmea* (3). Only the first approach seems to be legally justified.

1. Difference in treatment of commercial and investment arbitration when the application of EU law is at stake

It is no longer a matter of dispute that the mere fact that it may be necessary to apply EU law to settle a dispute does not deprive an arbitral tribunal of jurisdiction and thus that the dispute is arbitrable. The possibility for arbitral tribunals to apply EU law – the question primarily arose concerning EU competition law – is conditional on the possibility for Member State Courts to effectively review the application of EU law by arbitral tribunals. As the ECJ considered, in the *Eco Swiss* case:[12]

> *"Arbitrators, unlike national courts and tribunals, are not in a position to request this Court to give a preliminary ruling on questions of interpretation of Community law. However, it is manifestly in the interest of the Community legal order that, in order to forestall differences of interpretation, every Community provision should be given a uniform interpretation, irrespective of the circumstances in which it is to be applied (Case C-88/91 Federconsorzi [1992] ECR I-4035, paragraph 7). It follows that, in the circumstances of the present case, unlike Van Schijndel and Van Veen, Community law requires that questions concerning the interpretation of the prohibition laid down in Article 81(1) EC (ex Article 85(1)) should be open to examination by national courts when asked to determine the validity of an arbitration award and that it should be possible for those questions to be referred, if necessary, to the Court of Justice for a preliminary ruling."*

The reason for this is that arbitral tribunals, even if the seat of arbitration is located in a Member State, are not considered to be *"a court or tribunal of a Member State"* pursuant to article 267 TFEU which regulates references to the ECJ for preliminary rulings on questions of EU Law.[13]

Recently, the same advocate general Wathelet, in the opinion rendered in the *Genentech* case,[14] considered that *"the review by a court of a Member State of*

12. ECJ, Case C-126/97 *Eco Swiss China Time* (1999) ECR I-3055, §§33-40.

13. See for ex. K. Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law*, Oxford 2015, § 3.12 and the consistent line of case law quoted.

14. Opinion delivered on 17 March 2016 in Case C-567/14 *Genentech* v. *Hoechst GmbH*, formerly Hoechst AG, *Sanofi-Aventis Deutschland GmbH*.

whether international arbitral awards are contrary to European public policy rules cannot be conditioned by whether or not this question was raised or debated during the arbitration proceedings, nor can it be limited by the prohibition under national law preventing the substance of the award in issue from being reconsidered".[15] If this position were to be confirmed, the scope of review of the compatibility of arbitral awards with European public policy rules would be considerably increased in several jurisdictions, and particularly in France where, since the *Thalès v. Euromissile* case,[16] French Courts have only conducted a limited review of public policy issues on the basis of the prohibition against reviewing arbitral awards on their merits.[17]

This line of reasoning was not followed in the *Achmea* ruling, nor by advocate general Wathelet in his 19 September 2017 opinion. Consistent with his prior line of reasoning, the advocate general could have considered that, although an arbitral tribunal under a BIT is not "*a court or tribunal of a Member State*", an arbitration provision in a BIT is compatible with EU law as long as there is an effective possibility of review of the arbitral tribunal's application of EU law by a Court of a Member State, which condition was fulfilled in this case, given that the seat of arbitration was Frankfurt and that the German court could therefore review the way the arbitral tribunal applied EU law.

The reasoning followed by the ECJ as regards commercial arbitration is however not the one followed as regards investment arbitration,[18] in respect of which several Member States, the European Commission and, according to the present commentator, the *Achmea* ruling have now considered that the reference of a dispute to investment arbitration, based on an intra-EU BIT, is incompatible with EU law, regardless of the possibility and of the extent of review of the award.

The *Achmea* case is certainly open to question concerning the lightness of the reasoning it offers regarding the difference in the regimes applicable respectively to commercial and investment arbitration, where the application of EU law is involved. *Achmea* purports to rely on the fact that in commercial arbitration the settlement of disputes through arbitration "*originates in the freely expressed wishes of the parties*" which is supposedly not the case when the arbitration clause is stipulated in a BIT.[19] This seems to be at odds with the nature of consent when the arbitration clause is in a BIT, which is still based on the wishes of the parties, even if they are expressed at different times: by the State in the BIT itself, by the investor when the dispute arises.

This conclusion is particularly odd given that both regimes are supposedly justified by the same legal consideration, i.e. the fact that arbitral tribunals (commercial or investment) are not tribunals of a Member State and that, as a consequence, they cannot make references to the ECJ for a preliminary ruling. It is in other terms the European Union institutions' obsession with the "effective" interpretation and application of EU law that has determined the regimes applicable to each of these types of arbitration. The identity of principles applicable and equality of objectives put forward should logically have led the ECJ to apply the same regime in both cases. The fact that this is not the case, could make one wonder whether the actual objective of the European Union in respect of international arbitration does not in fact go beyond the mere effective application of EU law and whether what is in reality being sought is the supremacy of EU law above international treaties (see below I.B.). Before discussing this it is necessary to analyse the reasoning of the opinion of the advocate general and of the ruling, which are both the subject of debate.

15. *Ibid.* §71.

16. Paris Court of appeal, 18 November 2004, Rev. arb. 2005, 751. Confirmed by the *Cour de cassation*, Cass. civ. 1, 4 June 2008, *SNF v Cytec*, no. 06-15320.

17. The recent trend seems to tend to accept a more in depth review, especially for serious violations of public policy, such as corruption and money laundering, in line with what has been expressed by the advocate general Wathelet in *Genentech*.

18. Noting the inapplicability of the *Achmea* ruling to commercial arbitration, I. Michou, Ph. Pinsolle, *Arbitrage: l'arrêt* Achmea, *la fin des traité d'investissements intra-UE ?*, Dalloz, 7 mars 2018.

19. ECJ *Achmea* §55.

2. Arbitral tribunals are not tribunals of a Member State

Advocate general Wathelet proposed a different reasoning to the ECJ, which would have been similar although not identical to the reasoning in *Eco Swiss*. He supported the idea that investment arbitral tribunals are to be considered tribunals of a Member State, given that the arbitration agreement is included in an international treaty.[20] In doing so, he compared arbitration pursuant to a BIT with legally mandatory arbitration, in respect of which the ECJ has considered that tribunals can make references for a preliminary ruling.[21] It is true that dispute settlement mechanisms through arbitration are sometimes considered tribunals of Member States, subject to the essential condition that the jurisdiction and the composition of such arbitral tribunals be required by law and not depend on the parties' agreement.[22]

This case law could not apply to BIT investment tribunals, given that their existence is based on the consent of the parties, albeit such consent, as discussed above, is not simultaneous. As the investor is not bound to accept the State's offer of arbitration and can bring its claim before State Courts, the basis of arbitration is necessarily consent. Thus the *Danfos* and *Ascendi Beiral Litoral* cases – which decided that tribunals in legally mandatory arbitration have the possibility of referring issues of EU law interpretation to the ECJ for a preliminary ruling – cannot be transposed to investment arbitration tribunals.

The commentators of the Wathelet opinion, before the issuance of the ECJ judgment, were in their vast majority sceptical about the analysis proposed for precisely this reason.[23]

Albeit legally weak, the position defended by AG Wathelet was an attempt to reconcile EU law and investment arbitration. Had the ECJ followed it, intra-EU BITs

20. This thesis was previously defender notably by M. Szpunar, *Referrals of Preliminary questions by Arbitral Tribunals to the ECJ*, in F. Ferrari (ed.), The impact of EU Law on International Commercial Arbitration, Juris 2017, p. 85; J. Basedow, *The Transformation of the European court of Justice and Arbitration Referrals*, *ibid.* p. 125.

21. The advocate general notably relied on ECJ, 12 June 2014, Case C-377/13 *Ascendi Beiral Litoral*, see the opinion §§ 97-98.

22. See e.g. ECJ, case C-109/88 *Danfos* (1989) ECR 3199, spec. §§ 7-9 concerning the *Faglige Voldgiftsret* (the Danish Industrial Arbitration Board).

23. See. e.g. B. Remy, *CIRDI – Chronique de sentences arbitrales*, JDI (Clunet) 2018, 207 ff. spec. pp. 213-214.

would have been considered as satisfying the concerns expressed by the European Commission. A scholar described this approach as permitting a *"coexistence paisible"* between the European Union and investment arbitration.[24]

It is however not certain that this position, even if endorsed by the ECJ, would have preserved the *status quo*. Investment arbitral tribunals, considered as tribunals of a Member State, would not only become bound to refer to the ECJ for preliminary rulings and to follow such rulings, but also to comply with all the principles of EU law, including in particular the principle of *"primacy of EU law over the laws of the Member States and over every international commitment given between Member States"*.[25]

The hierarchy of norms would have totally changed. EU law would not have become applicable by investment arbitral tribunals merely as a constituent part of the law of the defendant Member State,[26] but would automatically have acquired a position higher than the provisions of the BIT. As a result, arbitral tribunals would have been obliged to systematically assess the compatibility of the obligations and the guarantees of a BIT with EU law and, in doing so, to refer systematically to the ECJ for preliminary rulings. Given that EU law by its nature contains only mandatory rules (freedom of establishment, freedom of movement, non-discrimination, prohibition of state aid, etc.), defendants in investment arbitral proceedings would have systematically raised defences based on incompatibility of the BIT or of the relief sought by the investor with EU law.

The consequences of this would have been not only to delay arbitral proceedings, but to make the ECJ the *de facto* competent court for settling investment disputes concerning Member States of the EU. The position defended by the advocate general was thus considered by some to be a trap,[27] and in any event was contrary to the practice of investment tribunals, which primarily apply the provisions of the relevant BIT. It was far from certain that arbitral tribunals would in practice have easily accepted to give effect to the primacy of EU law as understood by the European institutions.

The ECJ did not accept this approach and applied an even more drastic one.

3. *The ECJ's approach in* Achmea

Relying on the need to ensure the *"full effectiveness of EU law"*,[28] the ECJ considered that article 267 and 344 TFEU preclude the arbitration clause in the BIT. This is the affirmation of the primacy of EU law over international treaties entered into between Member States. The German Federal Court, being bound by a preliminary ruling,[29] is obliged to draw the necessary consequences of the invalidity of the arbitration clause of article 8 of the Netherlands – Slovakia BIT and set aside the award.

The question raised by the German Federal Court was related to an application to set aside the award on the ground of violation of public policy, but the answer given by the ECJ rather makes one think that the issue is one of the validity of consent to arbitration. The comparison of the wording of the question of the BGH and the answer of the ECJ is striking in this respect. According to the ECJ, EU law *"precludes"* the arbitration clause[30] and does not just *"preclude the application"* of the arbitration clause.[31] The ECJ strongly and brutally asserted the primacy of EU law over international law.

This means that it is on the basis of lack of jurisdiction that the arbitral award rendered in the *Achmea* proceedings will need to be set aside. It is true that, in references for preliminary rulings, the ECJ does not have the power to set aside the Member State's rule, which it finds to be contrary to EU law, but "only" has the power to note and declare the existence of a contradiction. It is up to the Member State and its courts to draw the consequences of the incompatibility. The incompatibility of a Member State's law (which includes international treaties of which the State is a signatory, see below) with EU law does not lead to the abrogation of the former, but only to the suspension of its binding force.[32] In this case the suspension of the binding force of an arbitration clause will lead to the inexistence of the offer to arbitrate by the State, and therefore the absence of consent to arbitration. The German Federal Court will not avoid article 8 of the BIT – a national court does not have the power to declare void a provision of an international treaty – but it will have to declare this provision inapplicable, which will lead to the same practical consequences.

Besides the immediate consequences of the ruling, the reasons put forward by the ECJ are subject to question, given that in the *Achmea* case the *"full effectiveness of EU law"* could precisely be ensured by the German Court's review of the award and, in particular, of the potential application (or non-application) by the arbitral tribunal of EU law. An application to set aside the award was available before a Court of a Member State, because of the seat of arbitration chosen and the application of the UNCITRAL arbitration rules. If the *Eco Swiss* criterion had been applied, the situation would have been perfectly acceptable in terms of the possibility of ensuring *"full effectiveness of EU law"*.

If the reasoning of the ECJ was to be followed to its logical conclusion, an arbitration clause in a BIT would only have contradicted the objectives of EU law insofar as it had chosen a mechanism excluding and preventing the effective review of arbitral awards by Member State Courts (in the context of set aside proceedings or of the recognition and enforcement of the award).[33] This would

24. B. Remy, *op. cit.*, p. 214.
25. Wathelet opinion, § 134.
26. *Achmea* Award on Jurisdiction, § 279.
27. Dimitrov, Digesting the AG Wathelet Opinion in Case C-284/16 *Slowakische Republik* v *Achmea BV*. Is it A Trap?, Kluwer Arbitration Blog, 7 October 2017.
28. ECJ Achmea, § 56.
29. On the binding effect of the judgment given by the ECJ in application of article 267 TFEU, see K. Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law*, Oxford 2015, § 6.27 and the case law quoted.
30. ECJ *Achmea*, ruling.
31. See question referred to the ECJ by the German Federal Court, see ECJ *Achmea*, § 23.
32. On the measures that Member State Courts must take in the event of national rules conflicting with EU law, see K. Lenaerts, P. van Nuffel, *European Union Law, Sweet & Maxwell*, 3rd ed. 2011, § 21-008 and the case law quoted.
33. See B. Hess, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice*, (2018 MPIlux Research Papers 2018 (3); to be published in Transnational Dispute Management: "The better approach would have been to strengthen the role of the courts

only have been the case of proceedings where the seat of arbitration is located outside the European Union or where the arbitration mechanism excludes a review of the award by a State court, such as ICSID arbitration.

The ECJ, relying on the need to ensure *"full effectiveness of EU law"* could have gone as far as outlawing arbitration clauses in intra-EU BITs providing for ICSID arbitration or permitting the choice of a seat of arbitration outside the European Union, but certainly not the specific arbitration mechanisms implemented in the *Achmea* proceedings that afforded all the protections normally required by EU law. In other words, the reasons put forward and the legal basis chosen by the ECJ did not justify the systematic prohibition of arbitration clauses in intra-European BITs, but at most their unenforceability in particular circumstances only.[34] Scholars consider that the aim of ensuring the effective application of EU law could also have been achieved by the systematic implementation of the practice of *amicus curiae* interventions of the European Commission in investment arbitration proceedings, not only to support a challenge of jurisdiction, but also to present how EU law should be interpreted and applied by the tribunal on the merits of the dispute.[35]

In sum, of the three discussed approaches, only the one chosen in *Eco Swiss* seems to be appropriate.

The *Achmea* ruling shows a decline of trust in arbitration to apply mandatory rules as part of public policy. At the time of the *Eco Swiss* ruling, the ECJ showed trust in arbitrators to apply EU law. The *Achmea* ruling, by dispossessing arbitrators of this power is, even if this is not said explicitly, a sign of mistrust in arbitral tribunals to duly apply EU law.

The radical approach chosen by the ECJ shows that the intention probably goes beyond ensuring the *"full effectiveness of EU law"* and is in fact to firmly establish the primacy of EU law over international treaties.

of EU Member States in the annulment and recognition proceedings of investment awards: Here, the insufficient respect for EU law might entail the setting aside or the non-recognition of the award. In these proceedings, the courts of the EU Member States can refer preliminary questions to the ECJ under Article 267 TFEU. However, with regard to intra-EU BITs, the ECJ went further and held that investment arbitration in this constellation is generally incompatible with the autonomy of EU law".

34. *Contra*, D. Moskvan, *The Clash of Intra-EU Bilateral Investment Treaties with EU Law: A BITter Pill to Swallow*, [2015] 22 Columbia Journal of European Law 101, which considers that the arbitration provisions in intra-EU BITs are *per se* incompatible with the primacy and autonomy of EU law.

35. See notably, S. Menétrey, *Droit international des investissements et droit de l'Union européenne*, in Ch. Leben (ed.) Droit international des investissements et de l'arbitrage transnational, Pedone, 2015, p. 613 ff., spec. p. 621-623.

The three different approaches					
Approach	**Starting point**	**Arbitrability of the dispute**	**Duty of the Arbitral Tribunal**	**Role of national courts or ECJ in the arbitral proceedings**	**Status of EU law**
1. ECJ Eco Swiss	Arbitral tribunals are not tribunals of Member States	Dispute arbitrable	Bound to apply EU law	Effective review by Member States' Courts	Primacy of EU law over the contractual stipulations of the parties
2. AG Wathelet in Achmea	Investment Arbitral tribunals are tribunals of Member States	Dispute arbitrable	Bound to apply EU law	Bound to refer to ECJ and follow its preliminary ruling	Primacy of EU law over the BIT
3. ECJ Achmea	Arbitral tribunals are not tribunals of Member States	Not relevant, the arbitral tribunal has no jurisdiction	The Arbitral Tribunal has no jurisdiction	Bound to declare it has no jurisdiction	Primacy of EU law over the BIT

B. The ECJ's goal: the primacy of EU law

Beyond the verification of the correct application of EU law that could, as seen above, accept the existence of investment arbitration within the EU, the goal of the ECJ is to be certain of the primacy of EU law over the provisions of the BIT concerned. According to the precedence principle, EU law is superior to the national laws of Member States, which means that they should not apply a national rule of law, which contradicts EU law.[36]

The ECJ has ruled that any rules of national law, including constitutional norms, are also subject to the precedence principle.[37] It is a matter for national judges not to apply the provisions of the Constitution of a Member State which contradict European law. EU law is therefore the highest norm in the hierarchy of Member States, even superior to their Constitutions and international agreements. In other words, from an EU legal order perspective, international treaties entered

36. The fundamental case that established this principle is *Costa v Enel*, ECJ Case C-6/64 [1964].

37. Cf. K. Lenaerts, P. van Nuffel, *European Union Law*, Sweet & Maxwell 3rd ed. 2011, § 21-005 and the case law quoted.

into by Member States are internal law ("*droit interne*") of Member States and are not necessarily considered as international law.

In its frequent interventions in intra-EU BIT arbitration proceedings, the European Commission has consistently stressed this conception. For example in its letter dated 11 October 2011 to the CPA concerning *European American Investment Bank AG (Austria) v. The Slovak Republic*[38], the Commission indicated that "*Insofar as the arbitration claims involve questions of application and interpretation of law covered by the EU treaties, EU law takes precedence. Where there is a conflict with EU law, the general international law rule of 'pacta sunt servanda' does not apply to treaties concluded between EU Member States*" and that "*An investor cannot rely on provisions of bilateral investment treaties concluded between EU Member States which are inconsistent with EU law and the Union's judicial system*".

In these proceedings, the European Commission requested the arbitral tribunal to declare it had no jurisdiction. On the contrary, as in the *Achmea* case, the tribunal decided it had jurisdiction for reasons similar to the ones given by the *Achmea* tribunal.[39] In particular, the tribunal considered that there are other instances where EU law is applied by courts and tribunals without a review by Member States' courts or by the ECJ.[40]

As seen above, this argument could address only one of the concerns of the European Commission, but not the fundamental concern, which is the certainty that EU law would always prevail over the relevant BIT. Given that investment arbitral tribunals are not tribunals of a Member State and that their existence is based on an international treaty, the EU may fear that they would give precedence to the treaty rather than to EU law. This is precisely what the European Institution aims to avoid.[41]

We are therefore witnessing a battle on the hierarchy of norms between two autonomous legal orders[42] and two incompatible rationales.[43] On the one hand, there is the EU legal order where EU law has precedence over international treaties between Member States and, on the other hand, there is the international legal order where international law, including the obligations resulting from BITs, may have precedence over EU law. This is the case, when it is considered that an international treaty should prevail pursuant to the criteria governing conflicts of international norms and treaties, such as the provisions of article 30 VCLT.[44]

38. Letter from the Commission to the PCA (PCA case N° 2010-17), available at: https://www.italaw.com/sites/default/files/case-documents/italaw4243_0.pdf.

39. Award on Jurisdiction, 22 October 2012, *European American Investment Bank AG (Austria) v. The Slovak Republic*, (Greenwood, Stern, Petsche).

40. *Ibid.*, §§ 249 ff. See also, I. Michou, Ph. Pinsolle, *Arbitrage : l'arrêt* Achmea, *la fin des traités d'investissements intra-UE ?*, Dalloz, 7 mars 2018.

41. There are nevertheless examples on substantive protection where investment arbitral tribunals give precedence to EU law, see below in context of the ECT, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19.

42. See, K. von Papp, *Clash of Autonomous Legal Orders*, [2013] 50 Common Market Law Review, p. 1039.

43. See, e.g. G.-A. Jean, *Le droit des investissements internationaux face à l'Union européenne*, Dissertation, Paris Dauphine, 2016, supervisors S. Lemaire, E. Torralba.

44. On conflicting treaties, P. Daillier, M. Forteau, A. Pellet, *Droit international public*, 8th ed. 2009, § 173.

However, there was no risk of conflict in the case of the 1991 the Netherlands-Slovakia BIT, given that it was prior to Slovakia's accession to the EU. Article 30.3 VCLT[45] would have provided an answer in international law identical to the answer given by the EU legal system; precedence of the TFEU.

The provisions of the VCLT regarding the application of successive treaties relating to the same subject-matter were insufficient above all because the issue at stake was and still is whether the arbitration clause of the BIT and EU law are compatible. The *Achmea* case answers this question from the perspective of the EU legal order. It is not certain that in the international legal order the answer would have been the same. Arbitral tribunals have answered the very same question considering that there was no incompatibility between EU law and the arbitration clause under the BIT.

In doing so arbitral tribunals have not only applied the provisions of the VCLT, but have also interpreted EU law and especially article 344 TFEU in a manner different from the ECJ in the *Achmea* judgment.[46]

We are therefore faced with two incompatible logical processes – that of EU law and that of international law – that are inherently valid but limited to their respective legal orders. This may lead to conflicting situations impossible to resolve other than by a State breaching either an international obligation or EU law.

An example can be found in the *Micula v Romania* case[47] concerning the compatibility of the enforcement of an ICSID award against Romania with EU law. The primary question in this case is not the validity of the arbitration agreement, but the possibility for a Member State Court to enforce an arbitral award according to an international treaty by which it is bound – the 1965 ICSID Convention providing for a duty to enforce the award[48] – whereas enforcement would, according to the EC Commission, be contrary to EU law (the prohibition of State Aid).[49]

This was precisely the dilemma faced by the English High Court which in January 2017[50] limited itself to staying its decision pending an expected ruling of the ECJ, but appeared to show its intention to give precedence to EU law obligations over the ICSID Convention. Mr. Justice Blair decided that "*enforcement of the Award is stayed pending the resolution of the claimants' proceedings in*

45. "3. *When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.*"

46. E.g. Final Award, 21 January 2016, SCC Case No V062/2012 *Charanne* v *Spain*, § 444: "*The scope of Article 344 TFEU cannot, therefore, be to prohibit Member States to submit any dispute that could involve an interpretation of European treaties to a dispute settlement proceedings other than those provided by EU framework.*"

47. *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L.* v. *Romania*, ICSID Case No. ARB/05/20.

48. Article 54(1) ICSID Convention: "*Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.*"

49. European Commission decision 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/C) (ex 2014/NN) implemented by Romania; *Micula* v *Romania* Arbitral award of 11 December 2013.

50. *Micula & Ors v Romania & Anor* [2017] Bus LR 1147, [2017] WLR(D) 35, [2017] EWHC 31 (Comm) (20 January 2017).

the European court seeking the annulment of the Commission's Final Decision of 30 March 2015. This is because the Commission's Final Decision prohibits Romania from paying the Award, and the "principle of sincere cooperation" in Art. 4(3) TEU as interpreted both in European and in English case law precludes national courts from taking decisions which conflict with a decision of the Commission."[51]

Blair J. considered expressly that this would not have been in breach of the ICSID Convention considering that *"this does not create a conflict with the duties of the UK under the ICSID Convention, because by registration under the Arbitration (International Investment Disputes) Act 1966 which implements the Convention, an ICSID award is equated to a final domestic judgment for enforcement purposes, and a purely domestic judgment would be subject to the same principle."*[52]

This conclusion is subject to question given that, if it is true that under ICSID Convention the enforcement of an award is governed by the law of the State where enforcement is sought[53] and that the ICSID award is to be treated as a final judgement of said State, there is still an obligation for the Contracting State to enforce it.

It is not certain that, in the international legal order, the systematic primacy of EU law would be recognised.

The analysis of the legal reasoning and the legal grounds adopted by the ECJ is especially useful in order to determine the potential effect and scope of the *Achmea* judgment.

II. – The uncertain impacts of the *Achmea* ruling

If there is one point on which observers are unanimous it is the fact that the ruling is not clear in terms of the effect it may have. If the ECJ declared the arbitration clause of Article 8 of the Netherlands-Slovakia BIT contrary to EU law, it did not say much regarding other, related situations and commentators diverge considerably on its scope: some minimize it considering that it is only relevant to the BIT subject to the referral to the ECJ and, on the opposite side, others consider that it has an effect on all investment arbitration proceedings where the application of EU law is at stake. The reality is probably in between, but there is a serious uncertainty.

Professor Armand de Mestral identified several questions that the *Achmea* ruling generated,[54] the vast majority of them being related to the determination of the effects it may have:

"[...] 2) Are all arbitral proceedings in the EU at risk?
3) What is the effect of its judgment on the Energy Charter?
4) What is the effect of its judgment on extra-EU BITs?
5) Must the 196 intra-EU BITS now disappear? [...]

51. Conclusion (3).
52. Conclusion (4).
53. Article 54(3) ICSID Convention
54. A. de Mestral, Oil-Gas-Energy-Mining-Infrastructure Dispute Management (OGEDIM) message dated 21 March 2018.

7) Does this ruling mean that the current award and pending cases are null and void?
8) What is the fate of survival clauses in intra-EU BITs?
9) What is the impact of this decision on investor-state proceedings outside the EU?
10) What is the impact of this ruling on proceedings under the ICSID Rules?[...]"[55]

These questions will be discussed distinguishing the scope of the instrument in which the arbitration clause is stipulated, since the impact of the *Achmea* ruling will not necessarily be the same as regards intra-EU (**A**) and extra-EU (**B**) investment treaties.

A. Intra-EU investment treaties

Intra-EU BITs are investment treaties the parties of which are only Member States of the European Union such as the Netherlands-Slovakia BIT subject to the referral in this case. It is important to note that these treaties were all initially entered into by a Member State with a third State, before the accession of the latter to the European Union. They became intra-EU BITs only later.[56] Member States were never permitted to enter into bilateral agreements regulating their economic relations, as these are exclusively governed by EU law.

The first question is whether all intra-EU BITs are concerned by the prohibition of the arbitration clause or only some of them. Although the limitation of *Achmea's* impact solely to the BIT under scrutiny has been advocated,[57] the general terms of the ruling seem to indicate that the scope is broader than that.[58] The importance of the *Achmea* decision was raised, even before it had been issued, by Member States who considered that this decision might have an impact on the proceedings brought before them.[59] This is further confirmed by the general grounds put forward by the ECJ and the objective of the affirmation of the primacy of EU law.

Both the language of the ruling and the above-mentioned objective suggest that it was not the ECJ's intention to create different categories of intra-EU BITs, in respect of only some of which the arbitration clause would be considered contrary to EU law. In particular, the fact that the arbitration clause explicitly provides as applicable the law of the Member State should not make any difference, as the application of EU law is mandatory in any case and not dependent on the choice

55. Only the questions directly related to the impact of the ruling are mentioned.
56. Cf. G. A. Berman, *EU Law as a Jurisdictional and Substantive Defense in Investor State Arbitration*, in F. Ferrari (ed.), The Impact of EU Law on International Commercial Arbitration, Juris 2017, p. 649.
57. I. Michou, Ph. Pinsolle, *Arbitrage : l'arrêt* Achmea, *la fin des traités d'investissements intra-UE ?*, Dalloz, 7 mars 2018.
58. See e.g. B. Hess, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice*, (2018 MPIlux Research Papers 2018 (3); to be published in Transnational Dispute Management.
59. See e.g. *GPF GP S.à.r.l. v. The Republic of Poland*, [2018] EWHC 409 (Comm), High Court, 2 March 2018. The High Court in set aside proceedings brought by the investor noted that Poland sought to reserve its right with regard to the then expected Achmea ruling, eventually rendered 4 days later.

of law made by Member States. Thus, admitting that the arbitration provision is compatible with EU law when it does not refer to Member State law as applicable law, but only to the BIT or international law, would be, in effect, to allow Member States to exclude, by a choice of law clause in the BIT, the application of a mandatory provision of EU law otherwise applicable, which is not acceptable by the ECJ.[60] Added to this, the analysis by the ECJ in *Achmea* does not go as far as verifying that a precise provision of EU law is applicable to the specific dispute at hand. It is sufficient that the BIT is entered into by two Member States.

Neither did the ECJ suggest that a distinction should be made in consideration of the date of the investment. The ruling will probably apply regardless of whether the investment that suffered from the breach of the BIT was made before or after the accession of the Member State to the EU. For the reasons discussed above, the effect of the ECJ decision is that generally this kind of arbitration clause is prohibited. The European Commission has intervened in support of Member States indiscriminately in all types of disputes where the arbitration clause was provided for by an Intra-EU BIT.

A ruling of the ECJ in application of Article 267 TFEU is binding not only on the national court hearing the case in which the decision is made – the German Federal Court in the *Achmea* proceedings – but is binding on all national courts:[61] the judgment is said to have effect *erga omnes*. This means that the interpretation given by the ECJ of Articles 267 and 344 TFEU as *"precluding a provision in an international agreement concluded between Member States [...] under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal [...]"*, is binding on all EU national courts and tribunals.

The absence of any distinction made by the ECJ in this regard may be interpreted as meaning that the ruling will have an effect on all intra-EU BITs. Pending and future arbitral proceedings will probably be affected by the ruling, as long as the jurisdiction of the arbitral tribunal is not finally and irrevocably decided or as long as a party has not failed to raise the challenge *in limine litis*, when the applicable arbitration rules require it.

With regard to completed proceedings where the challenge to jurisdiction was raised by the State and rejected by the Arbitral Tribunal the issue is also complex. In the event the State failed to raise an objection to jurisdiction in the arbitral proceedings, the invalidity of the arbitration provision of the BIT might possibly not be raised at a later stage.[62] However, a majority of arbitration laws provide for a complete *de novo* review of the jurisdiction of the arbitral tribunal at the stage of the set-aside proceedings and admit new challenges of jurisdiction, even not discussed before the arbitral tribunal. In the majority of jurisdictions – including France and the UK – a challenge to the jurisdiction of an arbitral tribunal *"proceeds by way of a rehearing rather than review"*,[63] which means that a Member State will be able to raise the incompatibility of the arbitration clause with EU law for the first time in set aside proceedings.

However, that does not finally dispose of the question. If this conclusion is certainly true in the EU legal order, this will not automatically follow in the international legal order.[64] The consequences will have to be drawn by investment arbitral tribunals that have to decide on their jurisdiction under the *compétence-compétence* rule[65]. If the arbitration provision is contrary to EU law, notably article 344 TFEU, in the EU legal order, it does not necessarily mean that the arbitration provision will be inapplicable for arbitral tribunals. Arbitral tribunals will probably address the problems pursuant to the principles of VCLT and notably article 30(3)[66]. The key point will not be the dates of the TFEU and of the BIT, but whether the provisions of the two treaties are incompatible. It is not certain that arbitral tribunals will automatically follow the assessment of the ECJ. It cannot be excluded that investment tribunals, in autonomously assessing such compatibility, will reach a different conclusion and, possibly, consider the arbitration provision to be valid.

If such an outcome is reached we will have an arbitration award inapplicable in the EU legal order (and therefore not enforceable in its area if the investor prevails) and probably valid in the international order. The efficacy of this arbitration award will depend on several factors, such as the arbitration mechanism (for example ICSID, or *ad hoc*), the seat of arbitration (in a Member State or in a Third State) and the place where enforcement is sought.

This will concern past investments, regardless of the date at which the alleged breach of the BIT occurred, as the survival clause provided by a vast majority of the BITs will continue to apply to existing investments. Concerning future investments, one of the consequences of the *Achmea* ruling will be the obligation for Member States to terminate the 196 Intra-EU BITs pursuant to article 351 TFEU, which has already been required by the European Commission[67] and put into motion by Italy, Ireland, and recently Romania.[68] The Netherlands announced the termination of its BITs and, at the same time, advocated for a multilateral treaty terminating all intra-EU BITs in force.[69] Therefore concerning new investments, the BITs would

60. B. Hess, *op. cit.*

61. See K. Lenaerts, I. Maselis, K. Gutman, *EU Procedural Law*, Oxford 2015, § 6.30 and the case law quoted.

62. For example, the challenge was not raised by Romania in the *Micula* case. One of the reasons seems to be that the arbitration proceedings were initiated in 2005 before the accession of Romania to the EU that occurred in 2007. The 24 September 2008 decision on jurisdiction and admissibility declared that the Tribunal had jurisdiction. The invalidity of the arbitration clause was raised by the European Commission in subsequent Court proceedings, notably before the English High Court (*Micula & Ors v Romania & Anor*, above, §§ 11-12), which considered that the question of *"validity of the Romania-Sweden BIT is not relevant to the issues to be decided in this case"* (*ibid.* § 180).

63. See e.g. *Jiangsu Shagang Group Co Ltd v. Loki Owning Company Ltd.*, [2018] EWHC 330 (Comm), §§ 13-14; *GPF GP S.a.r.l. v Republic of Poland*, [2018] EWHC 409, §§ 64-72.

64. See e.g. J. Kleinheisterkamp, *Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty*, (2012) Journal of International Economic Law 1((1), 85-109.

65. This rules is universally accepted and found notably both in the ICSID Convention (article 41(1)) and in the UNCITRAL arbitration rules.

66. Article 30. "Application of successive treaties relating to the same subject-matter [...] 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."

67. 18 June 2015, press release: *"Commission asks Member States to terminate their intra-EU bilateral investment treaties: The European Commission has initiated infringement proceedings against five Member States (Austria, the Netherlands, Romania, Slovakia and Sweden) today requesting them to terminate intra-EU bilateral investment treaties between them ('intra-EU BITs')."*

68. Law 18/2017 adopted by the Romanian Parliament on 27 February 2017, terminating 22 intra-EU BITs.

69. Letter of the Dutch Ministry of Foreign Affairs to the Parliament, dated 26 April 2018.

likely not be applicable and investors of a Member State could only seek protection under the law of the country hosting the investment or under EU law.

The question of the impact of the *Achmea* ruling also concerns the potential impact, beyond intra-EU BITs, to extra-EU investment treaties.

B. Extra-EU investment treaties

It is important to determine if the *Achmea* ruling may also concern investment treaties the parties to which are not only Member States of the European Union, but also non-EU, or third States. The question of the impact of *Achmea* may not necessarily receive the same answer if the dispute where a Member State is a defendant is brought by an investor of a Member State (1) or of a third State (2).[70] Attention must be given to the language of the ruling where important indications can be found. However the objective of ensuring the primacy and the effectiveness of EU law may also be considered.

1. Intra-EU disputes

The issue of intra-EU disputes brought on the basis of an international treaty, the parties to which also include third States, concerns the Energy Charter Treaty (ECT). The position of Member States defendants in these proceedings (notably Spain, Italy and Hungary) and of the European Commission, which has intervened as *amicus curiae*, has evolved. After having originally argued that the ECT included an (implicit) provision excluding intra-EU disputes from its scope,[71] the argument as to the validity of the arbitration provision of article 26 ECT was raised and presented in similar, if not identical, terms as in the disputes brought on the basis of intra-EU BITs discussed above.

The language of the *Achmea* ruling, which is insufficiently precise, does not provide a clear answer to this question. Indeed, the ECJ refers to the compatibility with EU law of an arbitration *"provision in an international agreement concluded between Member States"* and one can hesitate as to whether this concerns only international agreements between Member States or whether it also applies to multilateral agreements, which also include third States as parties.

Paragraphs 57 and 58 of the ruling however clearly concern treaties, such the ECT, to which the European Union is a party. The ECJ, relying on its past case law and notably its opinion on the accession of the EU to the ECHR,[72] considered that *"the competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions"*. The ECJ explicitly mentions the essential condition *"provided that the autonomy of the EU and its legal order is respected"*. It seems therefore that according to the ECJ, an arbitration clause in a multilateral agreement also concluded by the EU, such as the ECT, is compatible if it includes a mechanism to guarantee the autonomy of EU law.

This does not seem to be the case for the ECT as, depending on the dispute settlement mechanism chosen by the investor pursuant to article 26 of the ECT, a review of the compatibility of the arbitral award with EU law may not be applicable. Thus, the objective of the ruling identified above (the primacy and the full effectiveness of EU law) may confirm the need to extend the scope of the ruling to all intra-EU disputes whether they are brought on the basis of a BIT or the ECT. It should be noted, however, that arbitration tribunals have, in ECT cases, given significant precedence to EU law over the obligations of the ECT. The *Electrabel* tribunal considered that *"when the Respondent [Hungary] and Belgium acceded to the ECT in 1998, Belgium was an EU Member State, but the Respondent was not. In 2004, the Respondent became and remains an EU Member State. Accordingly, Article 307 EC [article 351 TFEU] (as interpreted by the ECJ) means that, if any inconsistency existed between the ECT and EU law, the ECT would apply in relations between EU Members and Non-EU Members, but that EU law would prevail over the ECT in relations between EU Members themselves (including Belgium and the Respondent)."*[73]

Finally, in reading paragraph 58, a hesitation is still possible given that the ECJ seems to consider relevant to the incompatibility of the arbitration provision with EU law, the fact that the Netherlands-Slovakia BIT was not concluded by the EU, suggesting that if that had been the case, the arbitration provision might have been compatible with EU law.[74] The fact that the EU is itself a contracting party of the ECT is likely to restrict the scope of application of the *Achmea* ruling. The international commitments and potential liability of the EU are at stake, given that invoking an incompatibility between article of the 26 ECT and EU law would amount to reliance by a party to a treaty on its own law to try to escape its international obligations,[75] which is prohibited by the VCLT.[76] In order to avoid

70. The hypothesis of a non-EU State as defendant in investment arbitration proceedings is not envisaged as this clearly is not impacted by the *Achmea* ruling.

71. This argument was systematically rejected given that it required to add to the ECT an additional condition not provided, see e.g. Final Award, 21 January 2016, SCC Case No V062/2012 *Charanne v Spain*, §§ 440–45; Decision on Jurisdiction, 6 June 2016, ICSID Case No ARB/13/30 *RREEF v Spain*, § 79 ff.; Award, 17 July 2016, SCC Case V2013/153 *Isolux v Spain*, §§ 641–60; Award, 27 December 2016, ICSID Case No ARB/14/3 *Blusun v Italy*, §§ 277–91; Award, 4 May 2017, ICSID Case No ARB/13/3 6 *Eiser Infrastructure v Spain*, §§ 179–207.

72. ECJ Opinion 2/13, 18 December 2014.

73. Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, § 4.187. See on the use of EC law as substantive defence in ECT cases, G. A. Bermann, *ECT and European Union Law*, in M. Scherer (ed.), International Arbitration in Energy Sector, OUP 2018, p. 203 ff.

74. This is the interpretation recently given by the Tribunal in *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain* (ICSID Case No. ARB/14/1), award dated 16 May 2018, §§ 678-683. The Tribunal considered that the *Achmea* judgment had *"no bearing upon the present case"* and was of only of limited application to BITs concluded between EU Member States. As such, the tribunal said it *"cannot be applied to multilateral treaties, such as the ECT, to which the EU itself is a party"*.

75. I. Michou, Ph. Pinsolle, *Arbitrage: l'arrêt* Achmea, *la fin des traités d'investissements intra-UE ?*, Dalloz, 7 mars 2018 : « *si l'Union européenne, par l'intermédiaire de ses juridictions, tentait d'anéantir la clause d'arbitrage figurant dans le TCE pour interdire un arbitrage interne à l'Union, on serait à notre sens non loin de la situation assez classique où une partie à un traité se prévaut de son propre droit pour échapper à ses obligations internationales ou plus précisément pour faire échapper l'un de ses membres à ses obligations internationales* ».

76. Article 27. *"Internal law and observance of treaties. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."* Article 46. *"Provisions of internal law regarding competence to conclude treaties.*

the risk of international liability, the EU may prefer to renegotiate the ECT, trying to exclude Intra-EU disputes from its scope of application.[77]

In any event, if an extensive interpretation is followed by the ECJ, litigants will nevertheless be faced with the same uncertainty, described above, as arbitral tribunals deciding on their jurisdiction, based on their own application of article 30(3) and 30(4)[78] VCLT and their independent assessment of the compatibly between article 26 ECT and article 344 TFEU, that may differ from the analysis of the ECJ.[79]

It is precisely in these terms that investment arbitral tribunals have approached this issue. They have interpreted article 344 TFEU as inapplicable to disputes between private parties and Member States and therefore considered the arbitration provision as valid. It remains to be seen if in subsequent decisions arbitral tribunals will adopt the interpretation of article 344 TFEU given by the ECJ in the *Achmea* case. The tribunal in *Blusun v. Italy* already suggested that, in case of a recognised inconsistency with article 344 TFEU, the arbitration provision of article 26 of the ECT would be inapplicable.[80]

If the validity of arbitration clauses is thus uncertain in intra-EU disputes based on the ECT, its validity is not in doubt in extra-EU disputes. However, EU law can still play an important role.

2. Extra-EU disputes

The language of the ruling seems to exclude incompatibility between EU law and arbitration provisions in BITs, and more generally investment treaties, giving rise to disputes between a Member State and an investor of a third State. Its operative part explicitly refers to *"international agreement concluded between Member States"*. *A contrario*, arbitration provisions in treaties with a third State are compatible with EU law, even though the objective of ensuring the effectiveness of EU law does not explain why a difference should be made when investment arbitration claims are made against a Member State by an investor of another Member State rather than by an investor of a third State.

This is an additional reason why the application of the *Eco Swiss* approach to investment arbitration would have been appropriate in that it makes no distinction (and would not discriminate) between investors of a Member State and of a third State.[81]

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1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State con ducting itself in the matter in accordance with normal practice and in good faith."

77. B. Hess, *op. cit.*

78. Article 30. *"Application of successive treaties relating to the same subject-matter [...] 4. When the parties to the later treaty do not include all the parties to the earlier one:*

(a) As between States parties to both treaties the same rule applies as in paragraph 3;

(o) As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."

79. See above.

80. Award, 27 December 2016, Blusun S.A., *Jean-Pierre Lecorcier and Michael Stein* v. *Italian Republic*, ICSID Case No. ARB/14/3, see §289.

81. See above.

One has nevertheless to bear in mind that the ECJ's answer is limited to the questions referred by the German Federal Court and one could argue that article 344 TFEU seems not to make a difference depending on whether the private party benefitting from the BIT entered into by the Member State is a national of another Member State or of a third State.[82] However, the applicability of extra-EU BITs is protected by the provision of article 351 TFEU according to which *"The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties"*.[83]

From a public international law point of view, this seems to be the only acceptable solution. If the arbitration clause in extra-EU BITs was held to be incompatible with EU law when a EU Member State is defendant, a dissymmetric offer to arbitrate would have been created: valid when made by a third State in favour of a EU investor and invalid when made by a EU Member State in favour of a non-EU investor. The absence of reciprocity would have resulted in uncertain protection of EU investors abroad and would probably amount to a violation of public international law.

The system is however not entirely satisfactory if regard is had to the situation of investments within the EU. Indeed, when investing in the EU, extra-EU investors may be regarded as better protected than EU investors, since they can benefit from substantive guarantees provided both by EU law and by any applicable BIT and have the choice to bring their claim either before the courts of the concerned Member State or to initiate arbitration proceedings.

Members of the European Commission[84] tend to minimize this effect arguing that EU law provides investors with efficient guarantees and mention as an example the *SEGRO* ruling[85] – issued on the same day as the *Achmea* judgment – by which the ECJ decided that the cancellation by Hungary of rights of usufruct on agricultural lands enjoyed by foreign investors was contrary to the free movement of capital. Even if, in this particular case, EU law granted substantive protection, this does not mean that this is systematically the case and that Member State courts provide foreign investors with the same level of procedural protection as investment arbitration.

Even if the arbitration provisions in these treaties are considered to be in conformity with EU law, this does not mean that EU law will not have an influence on extra-EU disputes. As internationally applicable mandatory law

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82. Cf. A. de Mestral, *op. cit.*, *"What is the effect of its judgment on extra-EU BITs ? EU Member States have concluded some 1200 BITs with non-EU states. Indeed, they invented the whole technique. The Achmea ruling only relates to intra-EU BITs but what will be the consequence for claims against an EU Member State under a BIT with a third state? The procedure is the same and potentially EU law may be relevant to the decision of the case."*

83. See on the precedence of pre-existing international obligations of Member States with third countries, K. Lenaerts, P. van Nuffel, *European Union Law, Sweet & Maxwell*, 3rd ed. 2011, §§ 22-050 ff. and the case law quoted.

84. Mr Thomas Wiedmann (European Commission, Directorate General Financial Stability, Financial Services and Capital Markets Union), Paris 11 April 2018, round-table discussion on "The Future of Intra-EU Investment Arbitration in the Aftermath of the Achmea Judgment."

85. ECJ, 6 March 2018, Cases C-52/16 and C-113/16 *'SEGRO' Kft. v Vas Megyei Kormányhivatal Sárvári Járási Földhivatala and Günther Horváth v Vas Megyei Kormányhivatal.*

(*loi de police*), provisions of EU law may be applicable to the merits of the dispute given that a Member State is defendant in the arbitration proceedings and may be relevant for the determination of the fulfilment of the obligations of the State under the investment treaty. The tribunal in *Electrabel v The Republic of Hungary*, excluded the liability of the State, when it acted pursuant to an obligation to which it was subject under EU law: *"Where Hungary is required to act in compliance with a legally binding decision of an EU institution, recognized as such under the ECT, it cannot (by itself) entail international responsibility for Hungary. Under international law, Hungary can be responsible only for its own wrongful acts. The Tribunal considers that it would be absurd if Hungary could be liable under the ECT for doing precisely that which it was ordered to do by a supranational authority whose decisions the ECT itself recognises as legally binding on Hungary."*[86]

EU law may also play a role in the review of the award either in setting aside proceedings or when recognition or enforcement of the award is sought in the EU area. An example of the application of EU law in these circumstances is the *Micula* case, where Romania, with support from the European Commission, is resisting enforcement of the award on the ground of the EU prohibition of State Aids. It is true that this happened in an Intra-EU dispute – the investors initiated arbitration proceedings relying on their Swedish nationality – but there is no reasons to restrict the application of EU law to this situation. In other words, if the investor in the *Micula* case had not been Swedish, but a national of a third State, the prohibition of State Aids would have applied in the same way.

As of today, extra-EU BITs, including arbitration clauses, are still applicable. In a more or less near future, they will progressively disappear as a consequence of the transfer to the EU of exclusive competence over foreign direct investment by the Lisbon Treaty.[87] BITs entered into by Member States with third States will continue to exist until they are replaced by EU agreements.[88]

86. Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, § 6.72.

87. E. Borovikov, B. Evtimov, A. Crevon-Tarassova, Ch. 15 *European Union*, in J.H. Carter (ed.), The International Arbitration Review, 2016, p. 187 ff. *Adde*, Ch. Söderlund, *The Future of the Energy Charter Treaty in the Context of the Lisbon Treaty*, in G. Coop (ed.), Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty, 2011, pp. 99-124.

88. On this issue, see e.g. S. El Boudouchi, *L'avenir des traités bilatéraux d'investissement conclu par les États membres de l'Union européenne avec des États tiers*, RTD Eur. 2011, p. 85 ; P. Juillard, *Investissement et droit communautaire. À propos des accords bilatéraux d'investissement conclu entre États membres et Pays tiers, Liber Amicorum Philippe Manin*, Paris, Pedone, 2010, p. 445.

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Scenario	Possibility of settlement of disputes by arbitration	Legal basis
Intra-EU BIT	Clause invalid	*Achmea*
Intra-EU disputes (multilateral treaty to which the EU is a party)	Clause valid. Always or only if the treaty respects the autonomy of EU law?	*Achmea* §57-58
Extra-EU disputes (if EU law applicable)	Clause valid	EU law may apply and is likely to prevent recognition and enforcement of the award

Conclusion

The above-mentioned outcomes will apply only where an arbitration provision is included in investment treaties. Consent to arbitration in investment matters can also be found in domestic investment laws and in investment contracts. The case of an investment law of a Member State which provides for the settlement of investment disputes by arbitration might however not be treated differently from the case of BITs, given that what is at stake is always the compatibility of Member States' legal system with EU law.

The situation of investment contracts is probably different. The question will be whether a Member State could conclude an investment contract with an investor of another Member State which includes an arbitration clause. The language of the *Achmea* ruling, referring to *"international agreements"* between States indicates that a contractual clause with a private person is possible. This seems to be further confirmed by the reasoning of the ECJ that is based on an alleged absence of *"freely expressed wishes of the parties"* in BITs.[89]

One of the consequences of the *Achmea* ruling may then be the reappearance of the traditional practice of investment contracts. It cannot be excluded that when an investor, national of a Member State, intends to invest in another Member State, he will require the latter to enter into a specific contract providing guarantees and the jurisdiction of arbitral tribunals to settle disputes.

It is likely that Member State investors will implement simpler strategies, e.g. by structuring their future investments in another Member State though a vehicle situated outside the EU,[90] in order to benefit from a BIT containing an arbitration clause compatible with EU law and providing for an arbitration mechanism (such as ICSID) that is immune from the intervention of the EU and will seek enforcement of an award issued against a Member State outside the territory of the EU.

89. *Achmea* ECJ, § 55; see above.

90. See e.g. suggesting the UK as a consequence of the outcome of the referendum for withdrawal from the EU, M. Burgstaller, A. Zarowna, *Possible Ramifications of the UK's EU Referendum on Intra- and Extra-EU BITs*, Journal of International Arbitration, 33 (2016) 565-576.