Law Review • vol. VII, issue 2, July-December 2017, pp. 3-23

EU LAW

THE TWISTED TALE OF THE COMPATIBILITY OF AN ISDS CLAUSE ESTABLISHED BY AN INTRA-EU BIT WITH THE EU LAW: A SCRUTINY OF THE ADVOCATE GENERAL WATHELET'S OPINION IN THE *ACHMEA* CASE

Anamaria TOMA-BIANOV
Transilvania University, Department of Law
E-mail: anamaria.bianov@unitbv.ro

Abstract:

Once a precondition for a successful accession to European Union for the countries of Eastern Bloc, the bilateral investment treaties concluded in the pre-accession period (currently, the "intra-EU BITs") became a "systemic risk" for the very legal order that encouraged their extension. The turning point from construction engagements to deconstruction remains imprecise in time and incomprehensible in its attempts, as the hegemony of EU law does not entirely supplement the level of investment protection afforded by intra-EU BITs. Undeniably, the EU Treaties and the intra-EU BITs do not offer the same standards of investment protection and do not provide for equivalent remedies, despite the European Commission's efforts to make us believe the contrary. Free movement of capital, freedom of establishing and the EU Charter of Fundamental Rights set out by EU law do not duplicate the guarantees that commonly enter the scope of an intra-EU BIT, such as full protection and security of investments (FPS), the fair and equitable treatment of investments (FET) and the prohibition of illegal expropriations. Moreover, a number of provisions that are likely to be incorporated in an intra-EU BIT, including most favored nation (MFN) clause, the umbrella clause, the sunset clause and the investor state dispute settlement (ISDS) clause, have no equivalent in EU law. In light of this argument, it is difficult to understand the policy of intra-EU BITs eradication without a proper, mutually-consented and effective reform of intra-EU investment system. Undoubtedly, the European Commission's crusade against the intra-EU BITs was initiated in order to prevent the cross-border EU investors to resort to an outside dispute settlement mechanism. In the European Commission's view, the reliance on investment treaty arbitration reveals the mistrust in the courts of EU Member States and puts at risk both the principle of mutual trust in the administration of justice in European Union and the supremacy of EU law. Nevertheless, the arbitral mechanism is presently under the scrutiny of the Court of Justice of European Union (CJ), which is called to rule on the compatibility of an ISDS clause with the EU law. The ruling in Achmea will definitely bring the light into the blurred context of the intra-EU investments and will vanish the legal uncertainty intra-EU investors are exposed to. But until that particular moment in time, a special attention should be given to the Opinion of the Advocate General Wathelet, delivered on 19 September 2017. The Opinion is not of tremendous importance for its final findings, as the CJ is not bound to follow it, but for its far-reaching and extremely lucid preliminary observations. Whether the

ISDS clause established by an intra-EU BIT will be validated in the European Union legal order, as prompted by AG Wathelet, remains a matter open to debate for the time being. Notwithstanding the importance of such a debate, it will be more interesting to find out an answer to the yet rhetorical question of AG Wathelet: "[h]owever, if those BITs were justified only during the association period and each party was aware that they would become incompatible with the EU and FEU Treaties as soon as the third State concerned had become a member of the Union, why did the accession treaties not provide for the termination of those agreements, thus leaving them in uncertainty which has lasted more than 30 years in the case of some Member States and 13 years in the case of many others?".

Keywords: *Public Law, European Union Law, Investment Treaty Arbitration under intra-EU BITs*

1. Introduction

A decade ago, the bilateral investment treaties (BITs) were far from being depicted in hyperbolized negative terms such as a "systemic risk" to the autonomy of European Union (EU) legal order. On the contrary, between 1991 and 2001, the EU institutions, including the European Commission, relied on the BITs as requisite instruments in preparing the accession to the EU of the countries of Eastern Bloc. As a consequence, the Association Agreements between the European Communities and their Member States, of the one part, and candidate countries (e.g. Hungary, Poland, Slovakia, Romania, Bulgaria, Croatia), of the other part, contained provisions urging the contracting states to extend the bilateral framework for the protection of foreign investments and conclude new BITs, where appropriate.

As a result of such incentive, by 2004, approximately 150 bilateral investment treaties between EU Member States (intra-EU BITs) were in force in the single market, silently coexisting with the Treaty establishing the European Community (EC Treaty). Most of those BITs contained an investor-state dispute settlement (ISDS) clause giving investors the right to arbitrate their claims before an arbitral tribunal, commonly perceived at that time as a neutral and depoliticized dispute resolution forum. Arbitration was conveniently employed as a sort of neo-colonial instrument to impose the rule of law on Eastern Bloc countries with fragile laws and traditions in the field of foreign investment protection. Despite its effectiveness in enforcing the BITS standards, arbitration was not the only mechanism available for the adjudication of the investor-state claims. In the alternative, some BITs provided for the right of investor to litigate their claims in front of the competent domestic courts of the host State of the investment (i.e. France-Bulgaria BIT, Netherlands-Bulgaria BIT, France-Hungary BIT), while others gave the investor the right to choose between conciliation and arbitration (i.e. Sweden-Hungary BIT).

1.1. Amicus curiae submissions by the European Commission in intra-EU investment arbitrations

The general compatibility of intra-EU BITs with EU law became a sensitive topic of debate once Eastern Sugar BV filed a notice to arbitration under Article 8 of the *Agreement on encouragement and protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic* (1991) in 2004. That was the beginning of the first intra-EU investment treaty arbitration, an ad-hoc UNCITRAL arbitration, seated in Paris and administered by Stockholm Chamber of Commerce (SCC).

At an early stage of the arbitration proceedings, the Respondent State raised objections to the jurisdiction of the Arbitral Tribunal inferring mainly that the BIT was implicitly superseded by the *acquis communautaire* when the Czech Republic acceded to the EU of which the Netherlands was already a member. Given the novelty of the argument, the European Commission was invited to present its assessment on the validity of the intra-EU BITs. The European Commission's letter dated 13 January 2006 strikes by its confusing exposé which was conveniently exploited by both parties to arbitration in their own favor. Such an evidence determined the Arbitral Tribunal to describe the letter as "for the most part diplomatic or ambiguous, and in any event, by its terms, without prejudice to any interpretation by a *judicial authority* which in the Arbitral Tribunal's understanding, includes the present Arbitral Tribunal"[1]. Unsurprisingly, the Arbitral Tribunal upheld the jurisdiction and decided the dispute on the merits.

In the years that followed, the European Commission boosted its stance in the various arbitration proceedings in which it has intervened as *amicus curiae* in support of the jurisdictional objections raised by the respondent states. The Commission predominantly argued that the intra-EU BITs are redundant and contrary to EU law given the "comprehensive protection" offered to the intra-EU investors by virtue of EU membership. The benefits of free movement of capital and freedom of establishment were invoked to substantiate the argument that the subject matters of the intra-EU BITs and EU Treaties overlap at such a great extent that renders the ISDS clause if not invalid, at least inoperable. The argument was consistently rejected by arbitral tribunals sitting in intra-EU investment arbitrations for the main reason that EU Treaties (even after the entry into force of Lisbon Treaty) fail to provide an investment protection similar or equivalent with that guaranteed by the intra-EU BITs.

1.2. The infringement proceedings and the incomplete termination of intra-EU BITs

Constantly defeated in investment arbitrations, the European Commission became determined to take any measure that results in termination of intra-EU

---

[1] *Eastern Sugar B.V. v Czech Republic* (UNCITRAL) (Stockholm Chamber of Commerce (SCC) Case No 088/2004), Partial Award of 27 March 2007, para. 120

BITs, described in its own words as "an anomaly on the single market"[2]. Consequently, on June 2015, the Commission initiated infringement proceedings against Austria, the Netherlands, Romania, Slovakia and Sweden and requested the Member States to terminate their intra-EU BITs[3]. On 29 September 2016, a reasoned opinion was sent to the aforesaid five EU Member States[4], the instrument of a "reasoned opinion" constituting the second stage in infringement proceedings under Art. 258 of the Treaty on the Functioning of the European Union ("TFEU").

The pressure exerted by the European Commission was extremely efficient in the case of Romania which became the third country to terminate its intra-EU BITs, following Italy in 2012 and Ireland in 2013. The example of Romania is not singular between the Eastern Bloc countries. Poland is also determined to terminate its intra-EU BITs and has already taken consistent steps in this regard.

To revert to the Romanian case, the domestic Law no. 18/2017 approving the termination of 22 intra-EU BITs came into force on 24 March 2017. The unique article of the aforementioned law concisely stipulates that the treaties shall be terminated by "consent or unilaterally", enabling thus the Ministry of Foreign Affairs to further negotiate the exit engagements. The phrase "by consent or unilaterally" should not be treated as a marginal one, considering that all 22 intra-EU BITs, without exception, contain a *sunset clause* that extends their validity for a period up to 10, 15 or 20 years following their termination. The provisions of the *sunset clauses* apply exclusively to those investments made prior to the date when the notice of termination becomes effective and only in those particular cases when the BITs are terminated unilaterally. The application of the sunset clauses can be precluded if the bilateral investment agreements are terminated by consent. In this latter case, the contracting states may agree to terminate the BITs together with their *sunset clause*, as they may also agree to revise the *sunset clause* and shorten the period of time in which the BIT continues to be effective.

In the hypothetical situation the Romania's intra-EU BITs did not contain any provision with regard to termination or denunciation, Article 56 of the Vienna Convention on the Law of Treaties (VCLT) would have been triggered. Article 56 VCLT covers the termination of treaties which neither contain any provision regarding their duration or termination nor mention any right of denunciation or withdrawal. Accordingly, a right of denunciation or withdrawal may be implied depending upon the character of the treaty and subject to a reasonable period of notice of not less than twelve months.

---

[2] *Achmea B.V. (formerly known as Eureko B.V.) v Slovak Republic* (UNCITRAL) (PCA Case No 2008-13) Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, para. 179

[3] European Commission, June Infringement Package: Key Decisions, MEMO/15/5162

[4] European Commission, September Infringement Package: Key Decisions, MEMO/16/3125

1.3. The legitimacy of intra-EU BITs' eradication under scrutiny

The reverse incentive of the European Commission, as compared with the 1991-2001 incentive, raised legitimate inquiries with regard to the policy of intra-EU BITs eradication and its consistency with the very values and principles that are presumably protected. The first European Commission's submission on the validity of intra-EU BITs in *Eastern Sugar B.V. v Czech Republic* opened a Pandora's Box that eventually succeeded to divide the EU Member States and throw the cross-border EU investors into a climate of legal uncertainty.

In a final attempt to restore the credibility of its deconstruction engagements, on 25 July 2017, the European Commission presented a *Roadmap* aiming the adoption of a so-called "Interpretative Communication on the existing EU standards for the treatment of cross-border intra-EU investments". The interpretative communication seeks primarily to tackle the "apparent lack of awareness amongst a number of market participants and other stakeholders about the level of protection afforded to cross-border EU investors by EU law"[5]. While we agree with the Commission on the account that the EU law provides for specific standards of intra-EU investment protection, nonetheless it is difficult to assess that these standards are as comprehensive as those granted by intra-EU BITs.

To take the "full protection and security of investments" (FPS) standard, although it has never been construed and imposed as a strict liability standard, it still encompasses a high degree of diligence expected from a host state of investments. Arbitral Tribunals and commentators are divided over whether the FPS standard requires merely that host states take the appropriate measures to safeguard investors or their investments from physical harms, or whether it also requires legal and economic security[6]. However, even under a narrow interpretation, the FPS standard is not exhausted by the rights flowing from the freedom of establishment under EU law. The FPS standard subsists for as long as the investment remains in place, no matter how long after it has been established and no matter whether or not the treatment complained of is discriminatory[7].

„Fair and equitable treatment" (FET) standard is perhaps the most flexible, broadest construed and ongoing developing standard of international investment law. As a consequence, we prudently note that the substantive content of the FET standard has been elucidated by arbitral tribunals on a case-by-case basis. Despite disparities, there are also some convergences with regard to the elements the FET standard incorporates. Accordingly, the FET standard habitually entails: "(a) the prohibition of manifest arbitrariness in decision-making, that is, measures taken purely on the basis of prejudice or bias without a legitimate purpose or rational

[5] European Commission, Roadmap - Ares(2017)3735326

[6] See, C. Schreuer, Full Protection and Security, Journal of International Dispute Settlement, Volume 1, Issue 2, 1 August 2010, pp. 353–369

[7] *Achmea B.V. (formerly known as Eureko B.V.) v Slovak Republic* (UNCITRAL) (PCA Case No 2008-13) Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, para.

explanation; (b) the prohibition of the denial of justice and disregard of the fundamental principles of due process; (c) the prohibition of targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (d) the prohibition of abusive treatment of investors, including coercion, duress and harassment; (e) the protection of the legitimate expectations of investors arising from a government's specific representations or investment-inducing measures, although balanced with the host State's right to regulate in the public interest"[8]. The EU law does not provide for a perfect correspondent of the FET standard, but for at most an array of principles and rules that are applicable exclusively within the scope of the EU treaties, nonetheless these guarantees do not exhaust the positive and negative obligations undertaken by the State through intra-EU BITs. Even considering the plethora of EU principles and rules of law that might overlap in situations covered by EU Treaties with the constituent elements of the FET standard, one should not lose sight of the fact that the arbitral tribunals have jurisdiction to examine and interpret a measure adopted in violation of FET standard through domestic legislation. In contrast, the Court of Justice of European Union has no jurisdiction to interpret national law. To conclude on this last aspect, the intra-EU BITs generate an international level of review for national regulations and laws that has no substituent in EU law.

Finally, the protection against expropriation under an intra-EU BIT covers concepts as "assets" and "investments" rather than the narrower concepts of "possessions" and "property" protected by the EU Charter on Fundamental Rights. Moreover, the protection granted through investment treaties is not limited to the specific cases where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright physical seizure. Expropriation could also occur through interference by a host state in the use of investor's property or with the enjoyment of its benefits even where the property is not seized and the legal title to the property is not affected[9]. There are no current indications that Article 17 of the Charter on Fundamental Rights covers concepts such as "indirect", "creeping", or "de facto" expropriation, or measures "tantamount" to expropriation. Even considering a jurisprudential development in this respect, the application of Article 17 is limited to those particular cases where the Member States implement EU law.

In view of present succinct exemplification, the conclusion that can be triggered is that EU law does not provide substantive rights for investors that extend as far as those provided by an intra-EU BIT. Therefore, the enduring efforts

---

[8] UNCTAD Series on Issues in International Investment Agreements II, Fair and Equitable Treatment, United Nations, New York and Geneva, 2012, p. 6

[9] *See* OECD (2004), ""Indirect Expropriation" and the "Right to Regulate" in International Investment Law", OECD Working Papers on International Investment, 2004/04, OECD Publishing. http://dx.doi.org/10.1787/780155872321

of the European Commission to decredibilize the existent framework of intra-EU investment protection in its entirety are unintelligible as long as no replacement is envisaged.

Undeniably, the main concern of the European Commission in the matter of intra-EU BITs is embodied by the ISDS clause that gives the investors the right to rely on the arbitration mechanism. This concern became notorious early as 2006, when the Commission submitted an informal note to the Economic and Financial Committee of the Council (EFC) with regard to intra-EU BITs. At that moment, the Commission warned that "investors could try to practice forum shopping by submitting claims to BIT arbitration instead of - or additionally to - national courts. This could lead to BIT arbitration taking place without relevant questions of EC law being submitted to the ECJ, with unequal treatment of investors among Member States a possible outcome."[10] By letter addressed to the President of the Council of the European Union, the EFC replied: "[m]ost Member States did not share the Commission's concern regarding arbitration risks and discriminatory treatment of investors and a clear majority of Member States preferred to maintain the existing agreements"[11]. Ten years after, the infringement proceedings initiated against five Member States to terminate their intra-EU BITs clearly disclose the Commission's determination to suppress the arbitration mechanism.

One might still doubt that the presumably incompatibility of ISDS mechanism with EU legal order represents such a strong and pertinent argument to legitimate the policy of intra-EU BITs' eradication. After all, the arbitration is not the only mechanism available for the settlement of a dispute between an investor and the host state of investment. Litigation in domestic courts (be them courts of the host state or of another state) and diplomatic protection were traditionally considered as alternatives to arbitration, provided that these mechanisms bear significant limitations. Nevertheless, as pertinently vindicated by Stephen W. Schill, "for the moment, investor-state arbitration is the only viable option to grant access to justice to foreign investors and to allow enforcement of international investment agreements (IIAs) disciplines in a neutral forum"[12].

In such a blurry context, *Achmea* came as an unexpected opportunity to remove the uncertainty currently surrounding the intra-EU BITs. *Achmea B.V. (formerly known as Eureko B.V.) v Slovak Republic* was one of the several arbitration proceedings in which the European Commission intervened in order to endorse the argument of the inherent incompatibility of intra-EU BITs with EU

[10] Vis-Dunbar, 'EU member states reject the call to terminate intra-EU bilateral investment treaties', Investment Treaty News, 10 Feb. 2009, available at: https://www.iisd.org/itn/2009/02/10/eu-member-states-reject-the-call-to-terminate-intra-eu-bilateral-investment-treaties/

[11] Idem

[12] S. Schill, *In Defense of International Investment Law*, ACIL Research Paper 2017-09, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2922520

law. Yet, it is the first arbitration that raised the opportunity for the CJ to rule on the compatibility of an ISDS clause established by an intra-EU BIT with EU law.

Given the importance in terms of precedent of the *Achmea* case, in the following we shall proceed to a brief presentation of the arbitration and annulment proceedings that set the conditions for the preliminary reference to the CJ, for ultimately to bring into focus the astonishing and profound Opinion of the Advocate General Wathelet, delivered on 19 September 2017.

2. The *Achmea BV v Slovak Republic* Arbitral Awards and their Annulment Proceedings

2.1. The background of the dispute

Following its accession to the European Union on 1 May 2004, the Slovak Republic liberalized its health care insurance market, setting up a system of regulated competition that had prompted Achmea, a Dutch company, to invest in the Slovakian health insurance sector. The new government installed in July 2006 subsequently reversed the 2004 liberalization regime preventing Achmea from distributing profits to its shareholders ("ban on profits") and from selling its portfolio ("ban on transfers"). Other measures adopted at that time included "a prohibition on the use by health insurance companies of insurance brokers, a requirement that health insurance companies contract with certain named state-owned hospitals, and an obligation for health insurers to submit their financial budgets to the Slovak government 'for discussion'"[13].

2.2. The arbitration proceedings and the intra-EU objections

Achmea commenced the arbitration claiming that the Slovak Republic violated the 1992 *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic* ("Netherlands-Czechoslovakia BIT"). The proceedings were conducted under UNCITRAL Arbitration rules, by an ad-hoc Arbitral Tribunal seated in Frankfurt, Germany. The Permanent Court of Arbitration (PCA) provided administrative support during the arbitration proceedings. In the *Award on Jurisdiction, Arbitrability and Suspension*, rendered on 26 October 2010, the Tribunal rejected the objections raised by the Respondent State and endorsed by the European Commission on the incompatibility of the intra-EU BIT with EU law[14]. In the *Final*

[13] *Achmea B.V. (formerly known as Eureko B.V.) v Slovak Republic* (UNCITRAL) (PCA Case No 2008-13) Final Award of 7 December 2012

[14] *Achmea B.V. (formerly known as Eureko B.V.) v Slovak Republic* (UNCITRAL) (PCA Case No 2008-13) Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010

Award dated 7 December 2012, the Tribunal upheld the most part of Achmea's claims, and ordered Slovakia to pay €22.1 million in damages[15].

To revert to the intra-EU jurisdictional objections dismissed by the Arbitral Tribunal sitting in *Achmea BV v Slovak Republic*, they could be condensed and addressed under four broad limbs: (1) termination of the BIT under Article 59 VCLT; (2) inapplicability of the BIT under Article 30 VCLT; (3) inapplicability of the BIT under EU law and (4) non-arbitrability of the dispute under German law.

Each of the jurisdictional objections was thoroughly investigated by the Arbitral Tribunal who managed to refine the international law based perspective on the interaction between intra-EU BITs and EU law, previously developed by the Tribunal sitting in *Eastern Sugar BV v. The Czech Republic.*

In a nutshell, while adopting a reverse *Kadi*[16] reasoning, the Arbitral Tribunal concluded that its jurisdiction over the dispute must be appreciated in accordance with the instruments by which consent to arbitration originated, namely the Netherlands-Czechoslovakia BIT and the international law, including applicable EU law. With respect to the argument of conflict of treaties, the Tribunal declared that EU law does not provide substantive rights for investors that extend as far as those provided by the Netherlands-Czechoslovakia BIT[17]. Particularly, the rights to fair and equitable treatment, to full protection and security, and to protection against expropriation extend beyond the protections afforded by EU law and, consequently, there is no reason why those rights should not be fulfilled and upheld in addition to the rights protected by EU law[18].

The Tribunal further admitted that the protection granted exclusively to nationals from one EU Member State may infringe EU law prohibitions on discrimination. However, in any event such prohibitions should not be a reason for cancelling investor's extensive rights under an intra-EU BIT. Moreover, it should be less a reason for treating the parties' consent to arbitration as invalid or ineffective[19]. In Tribunal's assessment, the alleged discrimination can be rectified by according to investors of all other EU Member States rights equivalent to those which the State has bound itself to accord to investors under Netherlands-Czechoslovakia BIT. In view of that, the Tribunal ultimately concluded that it was not in the position to cancel rights created by a valid treaty in order to safeguard a State party against the possibility that it might one day decide

---

[15] *Achmea B.V. (formerly known as Eureko B.V.) v Slovak Republic* (UNCITRAL) (PCA Case No 2008-13) Final Award of 7 December 2012

[16] Judgement of the Court of 3 September 2008, C-402/05 P - Kadi and Al Barakaat International Foundation v Council and Commission, ECLI:EU:C:2008:461, parag. 223

[17] *Achmea B.V. (formerly known as Eureko B.V.) v Slovak Republic* (UNCITRAL) (PCA Case No 2008-13) Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, para. 262

[18] Idem, para. 263

[19] Idem, para 266

to apply the treaty in a way that could violate its obligations under one or more other later treaties.

The argument related to non-arbitrability of the dispute under German law, as *lex loci arbitri,* was expeditiously dismissed as it overlapped with the argument of inapplicability of the Netherlands-Czechoslovakia BIT under EU law. Unlike the ICSID arbitrations conducted under 1965 Washington Convention that forbids any interference of the domestic courts in the annulment and revision of an award, the ad-hoc arbitration proceedings, as it was the case of *Achmea BV v. Slovak Republic*, are subject to the law at the seat of arbitration. *Lex loci arbitri* becomes particularly relevant in appreciating the validity of an arbitration clause and the arbitrability of a dispute, as they are common grounds for setting aside an arbitral award.

In the dispute at issue the Respondent State argued that EU law operates as part of German law, as *lex loci arbitri*, and therefore the Parties' consent and the jurisdiction flowing from such consent should be observed in accordance with EU law. Without rejecting the argument relative to the applicability of EU law in appreciating the arbitrability of the dispute, the Tribunal found that the *lex loci arbitri* does not deprive it of its jurisdiction.

2.3. The annulment proceedings

The Slovak Republic challenged the 2010 partial award before the *Oberlandesgericht in Frankfurt am Main* (Higher Regional Court of Frankfurt), arguing that the Arbitral Tribunal had no competence to adjudicate the dispute as the ISDS was invalid in EU legal order. Slovakia claimed the incompatibility of the ISDS clause with EU law, more specifically with Articles 18, 267 and 344 of the Treaty on the Functioning of the European Union (TFEU).

Following the dispatch of the Final Award, the Slovak Republic brought set-aside proceedings on public policy grounds, initially in relation to the tribunal's finding on jurisdiction and subsequently against the award on the merits. Slovakia argued, *inter alia*, that the recognition and enforcement of the awards would violate the *public order as it conflicts with EU law (Articles 344, 267 and 18 TFEU were recurrently invoked in advocating the invalidity of the ISDS clause).*

The Higher Regional Court dismissed the applications and upheld the approach of the Arbitral Tribunal sitting in Achmea BV v. Slovak Republic, as well as the validity of the award. Relying on the acte claire doctrine, the Oberlandesgericht refrained from making reference for preliminary ruling to the CJ.

Interestingly enough, the reasoning of the Higher Regional Court bears the same rhetoric as that employed the Arbitral Tribunal sitting in Eastern Sugar BV v. The Czech Republic. To recall it, during the arbitration proceedings, the Czech Republic urged the Tribunal to suspend the procedures and refer the questions regarding the validity of the ISDS clause and the arbitrability of the dispute to the CJ. The Tribunal rejected the submission, observing in first place that, under the jurisprudential series Nordsee[20] *and*

---

[20] Judgement of the Court of 23 March 1982, C-102/81, Nordsee v. Reederei Mond, ECLI:EU:C:1982:107, paragraphs 11-12;

Denuit[21]*, it cannot be regarded as "a court or tribunal of a Member State". Without dismissing as a whole the possibility of fitting the restrictive concept "court or tribunal of a Member State" for the purpose of Article 267 TFEU, the Tribunal concluded that it* saw "no reason to make a referral in a case **where the answer was not difficult**"[22].

2.4. The referral to the Court of Justice

Slovakia appealed to the *Bundesgerichtshof* (German Federal Court of Justice), which adopted a different approach with regard to the opportunity of preliminary ruling referral. The Federal Court appreciated that the questions of the incompatibility of an ISDS clause established by an intra-EU BIT with Articles 344, 267 and 18 TFEU had not been answered yet, therefore it referred the questions to the CJ and decided the suspension of the annulment proceedings.

The Federal Court accompanied its decision with detailed reasons[23], in which it clearly expressed its opinion that the ISDS clause does not violate Articles 344, 267 and 18 TFUE. In summary, the Federal Court first pointed out that the EU Treaties lacked a mechanism to settle disputes between Member States and individuals. So while disputes between Member States themselves are caught by Art. 344 TFEU, disputes between Member States and investors are not. Therefore, it cannot be derived that Art. 344 TFEU protects the decision-making authority of the CJ in determining the interpretation of EU law for all disputes in which EU law may be applied or interpreted. The provision of Art. 344 TFEU protects the sole competence of the CJ and the autonomy of the legal system for proceedings agreed upon by the EU treaties, therefore its jurisdiction is not impacted by the arbitration proceedings. In agreement with such a conclusion, the Federal Court recalled that CJ found no violation of Art. 344 TFEU with respect to establishing a court outside the system of Union law which would decide on disputes between individuals in patent cases[24].

Subsequently, the Federal Court expressed its reserves with regard to the alleged incompatibility of the ISDS clause with Article 267 TFEU. The Federal Court stressed out that the courts and tribunals of the Member States retain the ability to rely on the preliminary ruling mechanism at the annulment and enforcement stage of an arbitral award. The opinion is consistent with the prior verdict in *Eco Swiss*[25] by which CJ impels the national courts to inspect *ex officio* the

---

[21] Judgement of the Court of 27 January 2005, C-125/04, Denuit and Cordenier, ECLI:EU:C:2005:69, paragraph 13.

[22] *Eastern Sugar B.V. v Czech Republic* (UNCITRAL) (Stockholm Chamber of Commerce (SCC) Case No 088/2004), Partial Award of 27 March 2007, para. 137, emphasis added

[23] The unofficial English translation of the preliminary referral can be accessed at: http://www.allenovery.com/SiteCollectionDocuments/Translation_German_decision_BGH_(final).pdf

[24] Opinion 1/09 of the Court of 8 March 2011, ECLI:EU:C:2011:123, parag. 63

[25] Judgement of the Court of 1 June 1999, C-126/97, Eco Swiss China Time Ltd v Benetton International NV, ECLI:EU:C:1999:269

compliance of an arbitration award with EU law, during the annulment or enforcement proceedings. The uniform interpretation of EU law is thus ensured by virtue of Art. 267 TFEU as the courts of the Member States that inspect the compatibility of an arbitration award with EU law may turn (and, in some specific cases, must turn) to CJ in case of doubts.

Finally, in appreciating the collision of the ISDS clause with Art. 18 TFEU, the Federal Court invoked the precedent *Nimz v Freie und Hansestadt Hamburg*[26]. Accordingly, even if the ISDS clause were to amount to discrimination, this could be rectified by interpreting Slovakia's offer to arbitrate as extending to investors from all Member States, not just the Netherlands.

3. The Opinion of Advocate General Wathelet

On 19 September 2017, the Advocate General (AG) Melchior Wathelet delivered his long-awaited and insightful **Opinion** in *Achmea*, in which he concluded that the dispute resolution mechanism set in Article 8(2) of the BIT is not incompatible with the EU law and does not collide with Articles 344, 267, and 18 TFEU.

The AG Wathelet's Opinion is not surprising by its final finding that Articles 18, 267 and 344 TFEU do not preclude the application of an ISDS clause established by an intra-EU BIT, as the finding is consistent with the conclusions of the arbitral tribunals sitting in intra-EU investment treaty arbitrations. Equally, the proposal of AG Wathelet converges with the arguments presented by the German courts of annulment in support of the compatibility of the ISDS mechanism with EU legal order. In actual fact, the Opinion strikes by its preliminary observations that plainly denounce the inconsistencies and duplicity of the European Commission and of the EU Member States which intervened in support of the argument that intra-EU BITs are incompatible with the EU law.

The Opinion is also remarkable through the methodological investigation of the scope *ratione materiae* of the Netherlands-Czechoslovakia BIT and of the legal rules it encompasses. The thorough examination of the BIT was pursued in order to assess *inter alia* the accuracy of the European Commission's argument that EU law offers investors full protection in the field of cross-border investments. The acrimonious remarks of AG Wathelet substantiate the misleading picture of the "comprehensive" protection of cross-border investments at EU level: "I do not know what the Commission means by 'full protection', but a comparison between the BIT and the EU and FEU Treaties shows that the protection afforded to investments by those Treaties is still a long way from being 'full'. In my view, intra-EU BITS, and more particularly the BIT at issue in the main proceedings,

[26] Judgement of the Court of 7 February 1991, C-184/98 *Nimz v Freie und Hansestadt Hamburg*, ECLI:EU:C:1991:50

establish rights and obligations which neither reproduce nor contradict the guarantees of the protection of cross-border investments afforded by EU law"[27].

3.1. The preliminary observations

Before any account on the compatibility of the ISDS clause with Articles 18, 267 and 344 TFEU, AG Wathelet pointed out that the Member States that intervened in the *Achmea* case were divided in two distinct groups. The first group consisted of the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands, the Republic of Austria and the Republic of Finland, which are primarily "home" states for investors and therefore never or rarely respondents in arbitral proceedings. Unsurprisingly, this group intervened in support of the Dutch investor. The Czech Republic, the Republic of Estonia, the Hellenic Republic, the Kingdom of Spain, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, Hungary, the Republic of Poland, Romania and the Slovak Republic joined the second group of interveners, in support of Slovakia. The latter group gathered the primarily "host" states for investments that are more likely to be respondents in arbitral proceedings relating to intra-EU investments.

Although the clash between the two groups of interveners could aliment the allegations that investment arbitration harms developing states for the benefit of the wealthy ones, the lucid observations of AG Wathelet manage to restore the credibility of treaty commitments. The sharping inquiries of AG Wathelet recall in a very diffuse, but suggestive manner that the states are the undisputed masters of their treaties and are able to determine their fate. Consequently, the Member States that became aware of the incompatibility of intra-EU BITs with EU law at an early stage could have overcome their passivity and could have noticed the termination of the BITs to the co-contracting State party: "[i]t is surprising, (..), that, in the second group, which maintains that intra-EU BITs are incompatible with the EU and FEU Treaties, only the Italian Republic has terminated its intra-EU BITs, with the exception of the Italy-Malta BIT, whereas the other Member States in that group maintain them in force, in whole or in part, **thus allowing their own investors to benefit from them**"[28].

AG Wathelet ironically questioned the European Commission's evolving position towards intra-EU BITs, with direct reference to Commission's failure to provide for potential termination of the BITs in the various association agreements to which EU was contracting party: "[h]owever, if those BITs were justified only during the association period and each party was aware that they would become incompatible with the EU and FEU Treaties as soon as the third State concerned had become a member of the Union, **why did the accession treaties not provide for the termination of those agreements, thus leaving them in uncertainty which**

[27] Opinion of Advocate General Wathelet of 19 September 2017, C-284/16, *Achmea*, ECLI:EU:C:2017:699, parag. 180

[28] Idem, parag. 37, emphasis added

has lasted more than 30 years in the case of some Member States and 13 years in the case of many others?"[29].

The question is and remains rhetorical, as the counter-example presented by the AG Wathelet ascertains that neither the European Commission nor the EU Member States "*had the slightest suspicion*" that ISDS clause might be incompatible with EU law[30] at the moment when the accession agreements were concluded. In support of his assertion, AG Wathelet evoked the Energy Charter Treaty (**ECT**), ratified by both EU and constituent Member States in 1994. ECT also incorporates a comprehensive and tailor-made ISDS clause (Article 26) that applies to intra-EU investment disputes.

Furthermore, AG Wathelet stressed out that: "**the systemic risk** which intra-EU BITs represent to the uniformity and effectiveness of EU law, according to the Commission, is **greatly exaggerated**"[31]. In denouncing the manipulative negativist rhetoric promoted by the European Commission in the last decay, AG Wathelet relied on the UNCTAD's statistic. Accordingly, out of 62 intra-EU arbitral proceedings, the investors have been successful in only 10 cases, representing 16.1% of the total, a rate significantly below the 26.9% of "victories" for investors at the global level.

In this particular context, AG Wathelet recollected that the arbitral tribunals have to a large extent allowed the European Commission to intervene *amicus curiae* in arbitration proceedings and that none of the 10 cases decided in favor of the investors required the examination of the validity of acts of the Union or the compatibility of acts of the Member States with EU law. Additionally, a significant number of arbitral tribunals sitting in intra-EU investment arbitrations, including the Tribunal in *Achmea BV v. Slovak Republic*, have already acknowledged the supremacy of EU law. The only arbitration, i.e. *Ioan Micula and Others v Romania*[32], which resulted in an arbitral award allegedly incompatible with EU law is insufficient to substantiate a paramount threat to the autonomy EU legal order.

The AG's last preliminary observation was that the Netherlands-Czechoslovakia BIT no longer falls within the scope of Article 351 TFEU. Art. 351 TFEU, which is the logical complement to the conflict rules based on Article 4 (3) TEU, concerns the resolution of conflicts between the obligations entered into by Member States with third states and their obligations under EU law. However, as correctly pointed by AG Wathelet, even in the absence of a provision for conflict resolution as that settled in Art. 351 TFEU, the BIT does not automatically become null or void or inapplicable in its entirety. In actual fact, only those provisions of the BIT that are contrary to EU law become inapplicable or inoperative. All other provisions are applicable in so far as they are compatible with the EU Treaties.

[29] Idem, parag. 41
[30] Idem, parag. 43
[31] Idem, parag. 44
[32] *Ioan Micula and others v. Romania*, ICSID Case No.ARB/05/20, Final Award, 11 December 2013.

3.2. Article 18 TFEU: Non-Discrimination

AG Wathelet began the scrutiny of the request for a preliminary ruling with the third question referred, namely whether Article 18 TFEU precludes the application of the ISDS clause. Indisputably, the alleged incompatibility of the ISDS clause with the general principle of non-discrimination is the most delicate issue to be tackled by the CJ during the deliberation as a potential conflict between the two rules of law can't be completed disregarded.

With the nuance that such a conflict may occur only in those particular cases where there is a sufficient connector factor with EU law, the question is if the assessment of the conflict can result in invalidation of the parties' consent to arbitration. Within the ethos of investment treaty arbitration, this mechanism for settling the dispute between an investor and a host state is opened only to those who consent to it. Arbitration is not a sort of democratizing tool of access to justice as it is dependent upon the will of the parties, therefore the invalidity of the consent cannot be triggered from the fact that the offer to arbitrate was not explicitly extended to all the EU investors, despite their nationality.

Another key-question is to what extend the principle of non-discrimination will be interpret, as Article 18 TFEU lays down an obligation of national treatment. Accordingly, if a state grants a particular right, benefit or privilege to its own citizens, it must also grant those advantages to the citizens of other states while they are in that country. Undisputedly, the domestic investors are not beneficiaries of an ISDS mechanism, therefore there is no apparent reason to assess the incompatibility of the ISDS clause with Art. 18 TFEU.

Nevertheless, for reconciling a potential conflict between the ISDS clause and the EU principle of non-discrimination, a solution will be to interpret the host state's permanent offer to arbitrate as implicitly extended to all EU investors, only in those particular cases that enter the scope of EU Treaties.

To revert to the question of the referral court, Slovakia argued that the ISDS mechanism established by Article 8 of the BIT constitutes discrimination on the ground of nationality prohibited by Article 18 TFEU, as it provides for the right of the investors from a single EU Member State to bring their investment claims in front of an arbitral tribunal, a right not enjoyed by investors from other EU Member States.

During the hearing, European Commission and other interveners in support of Slovakia submitted that the referring court should aim not at Article 18 TFEU but at Articles 49 and 63 TFEU, which constitute special rules by reference to Art. 18 TFEU.

Article 18 TFEU prohibits any discrimination on grounds of nationality so that all nationals and EU citizens could be treated equally **within the scope of the Treaties**. Furthermore, as previously established by the case-law of CJ, Art. 18

TFEU is intended to apply independently **only to situations governed by EU law for which the treaty lays down no specific prohibition of discrimination**[33].

In this line, and despite European Commission suggestion, AG Wathelet seemed to be the partisan of an independent approach to Article 18, in isolation to Articles 49 and 63 TFEU (i.e. freedom of establishment and free movement of capital), where the principle of prohibition of discrimination is given specific expression. Consequently, he extensively reposed on the issue regarding the compatibility of ISDS clause with the general principle of EU law which prohibits discrimination on the ground of nationality.

In this respect, AG Wathelet first observed that the ISDS mechanism does not come within the scope *ratione materiae* of either freedom of establishment, or free movement of capital, or any other provision of the TFEU. Moreover, as equally and previously established by the Arbitral Tribunal in *Achmea vs Slovak Republic*[34], the scope *ratione materiae* of the entire BIT surpasses the limits of freedom of establishment and of free movement of capital.

Then, in order to assess the extent of discrimination allegations, the Advocate General observed that the Republic of Slovakia entered into BITs with most other EU Member States, most of those BITs containing a similar ISDS mechanism. Such an evidence renders the allegations of discrimination on the ground of nationality highly exaggerated. In actual fact, there are only four EU Member States that never entered into a BIT containing an ISDS mechanism with Slovakia. Nonetheless, even in the latter case, it is difficult to argue the existence of a discrimination prohibited by EU law since EU law only prohibits discrimination to the extent that a Member State affords its own citizens preferable treatment (national treatment), and not to the nationals of other Member States (most favored nation treatment)[35].

Finally, in support of the conclusion that the ISDS mechanism does not constitute discrimination on the ground of nationality, prohibited by Article 18 TFEU, the Advocate General drew an analogy with bilateral double taxation conventions that have been found by CJ to be compatible with EU law[36].

3.3. Article 267 TFEU: Referral to the CJEU

The alleged incompatibility of the ISDS mechanism with Art. 267 TFEU gave AG Wathelet the opportunity to revert to and refine his innovative theory according to which the arbitral tribunals sitting in intra-EU investment treaty arbitrations are "courts and tribunals of the Member States".

---

[33] Judgement of the Court of 5 February 2014, C-385/12, *Hervis Sport- és Divatkereskedelmi*, ECLI:EU:C:2014:47, parag.25

[34] *Achmea B.V. (formerly known as Eureko B.V.) v Slovak Republic* (UNCITRAL) (PCA Case No 2008-13) Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, parag. 249-265

[35] Judgment of the Court of 2 February 1989, C- 186/87, *Cowan*, EU:C:1989:47, parag. 10

[36] Judgment of the Court of 6 September 2016, C-182/15, *Petruhhin*, EU:C:2016:630, paragraphs 29 to 33

The theory was first presented in a very expediting manner in a foot note of AG's Opinion in *Genentech*[37]. At that time the convictions were strictly related to ICSID arbitral tribunals, due to the permanent nature of the center for the dispute settlement. This time, AG Wathelet goes beyond such findings, inferring that the ad-hoc arbitral tribunals constituted under intra-EU BITs are "courts or tribunals of a Member State" for the purpose of Article 267 TFEU.

The conclusion came after applying the six limbs test developed by the CJ in its previous case-law. Accordingly, the criteria that must be examined in order to conclude that a judicial body is a court or a tribunal of a Member States are: (i) the judicial body is established by law, (ii) it is permanent, (iii) its jurisdiction is compulsory, (iv) its procedure is adversarial (*inter partes*), (v) it applies rules of law and (vi) it is independent.

There is no reason to scrutinize the last three criteria, as they are satisfied for most of the arbitration proceedings and, as a result, the reasoning of AG Wathelet has no flows from the international arbitration perspective. But this is not the case for the conclusions drawn after the investigation of the first three criteria, as they deviate from the perspective of public international law.

With respect to the first criteria, whether the tribunal is "established by law", undisputedly, the jurisdiction of the Arbitral Tribunal in *Achmea vs. The Slovak Republic* was primarily based on law, *lato sensu*, more specifically on an international treaty and its implementing legislation. Hence, in *Merck Canada* the CJ considered 'established by law' criterion satisfied because the jurisdiction of the Arbitral Tribunal **did not stem from the will of the parties**, but from Portuguese Law No 62/2011[38]. From the international investment arbitration perspective, the 'established by law' criterion is only partially satisfied.

The Arbitral Tribunal sitting in investment treaty arbitrations are reluctant in considering that their powers do not derive from the will of the parties, as consent to arbitration by both the host State and the investor is an essential prerequisite for the jurisdiction of an arbitral tribunal over a dispute. In this respect, the Tribunal sitting in *Achmea vs The Slovack Republic* pointed out in quite emphatic terms that consent is the cornerstone of an arbitration proceeding: " [i]t is important to bear in mind, as a paramount factor relating to jurisdiction, that the Tribunal **is established by, and derives its powers from the consent of the Parties**" [39].

As meticulously described by the Arbitral Tribunal in its Award on Jurisdiction, consent to arbitration operates at two successive stages. At the first

[37] Opinion of the Advocate General Wathelet delivered on 17 March 2016, C-567/14, Genentech, ECLI:EU:C:2013:177, footnote 34.

[38] Order of the Court (Eighth Chamber) of 13 February 2014, C-555/13, Merck Canada, ECLI:EU:C:2014:92.

[39] *Achmea B.V. (formerly known as Eureko B.V.) v Slovak Republic* (UNCITRAL) (PCA Case No 2008-13) Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, parag. 222, emphasis added

stage, the consent originates from the ISDS clause of the BIT. As a matter of international law, those provisions constitute an offer to arbitrate which can be accepted by an investor. At this stage, the Tribunal is concerned with the consent of the host state of the investment and the home state of the investor as expressed in the ISDS clause and which is interpreted in accordance with international law and, in particular, with VCLT.

At the second stage, consent originates from the offer's acceptance by the investor, commonly effected through the initiation of arbitral proceedings under ISDS clause of the BIT. Upon such acceptance there is consent between the investor and the host state of the investment to submit the dispute to the jurisdiction of the tribunal constituted in accordance with the BIT. Providing that all other conditions stipulated in the BIT have been met, the tribunal established in accordance with the BIT has at least *prima facie* jurisdiction over the dispute.

With regard to the "permanency" criterion, AG Wathelet's demonstration is, regrettably, quite confusing. While admitting that the individual tribunals constituted under the treaty are ephemeral, AG Wathelet relies on the institutionalization of arbitration to conclude that this criterion is satisfied. In his opinion, a reference to institutional rules (such as ICSID or the SCC) or even administration by an arbitral institution (such as the PCA) is sufficient to comply with "permanency" criterion. Even admitting that the institutional rules or administration have an overriding effect upon an *ad-hoc* arbitration proceeding and manage to convert it into a permanent one, this argument does not stands for the ad-hoc investment arbitrations that remain in completely autonomy from the arbitral institutions.

Finally, the "compulsory jurisdiction" criterion was examined from the perspective of *Ascendi*[40] precedent. The Advocate General concluded that the fact that the investor has a choice of bringing proceedings before the domestic courts or an arbitral tribunal does not affect the compulsory nature of the arbitral tribunal if the investor chooses that forum. The finding is completely conflicting with the Arbitral Tribunals standpoint in this respect, sometimes expressed in quite pedagogical words: "There is no such thing as compulsory arbitration even though occasionally some state courts go by the name of arbitral tribunal. Normally, parties are free to agree to arbitration or not. Once they have agreed to arbitration, they are of course bound"[41].

Moreover, even the ICSID arbitral tribunals will be extremely reluctant in embracing the theory that they are courts or tribunals of EU Member States, as already expressed in *Electrabel vs. Hungary*: ''This ICSID arbitration is a dispute resolution mechanism governed exclusively by international law. As a result of the

---

[40] Judgement of the Court (Second Chamber) of 12 June 2014, C-377/13, Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta, ECLI:EU:C:2014:1754.

[41] *Eastern Sugar B.V. v Czech Republic* (UNCITRAL) (Stockholm Chamber of Commerce (SCC) Case No 088/2004), Partial Award of 27 March 2007, para. 134

Tribunal's international status under the ECT and the ICSID Convention, several of the Commission's submissions cannot be taken into account in this arbitration, because they are based on a hierarchy of legal rules seen only from the perspective of an EU legal order applying within the EU, whereas this Tribunal is required to operate in the international legal framework of the ECT and the ICSID Convention, outside the European Union"[42].

To conclude on this, even if it might be beneficial to consider the investment arbitral tribunals as courts or tribunals of Member States only for the purposes of Art. 267 TFEU, such a perspective is legally inconsistent with public international law and it might not be embraced by the arbitrators. It will be however interesting to see if the CJ actually addresses the argument that arbitral tribunals sitting in intra-EU investment treaty arbitrations are "courts and tribunals of the Member States", as the referral court sought only to find out if Article 267 TFEU is conflicting with the ISDS clause.

In any event, in the particular case of the Netherlands-Czechoslovakia BIT, the ISDS clause did not preclude the application of Art.267 TFEU, as the matter regarding the presumably incompatibility of the arbitral award with EU law was deferred to the CJ by the court of annulment. The *Achmea* case is consistent with the previous finding of the CJ that the courts and tribunals of the Member States retain the ability to rely on the preliminary ruling mechanism at the annulment, recognition and enforcement stage of an arbitral award where necessary. Evidently, this assumption does not hold true for the ICSID awards, nonetheless Article 8 of Netherlands-Czechoslovakia BIT makes no reference to ICSID arbitration. As a result, it will be difficult to invalidate this particular ISDS clause just for the fact that other ISDS clauses incorporated in other intra-EU BITs allow investors to rely on ICSID arbitrations for the settlement of their dispute with a host state of investment.

3.4. Article 344 TFEU: Exclusive Jurisdiction of the CJEU

The first question addressed by the referral court was the last examined by AG Wathelet, probably because it is the least probable to assess an incompatibility of the ISDS clause with Article 344 TFEU. The AG Wathelet's primary argument with regard to the alleged exclusive jurisdiction of the CJUE under Art. 344 TFEU was that disputes between an investor and a Members State do not come within its scope. Art. 344 TFEU applies only to the disputes between Member States and between the Member States and the European Union. Moreover, in the famous Opinion 2/13 that deals with the problematic accession of the EU to the European Convention on Human Rights (ECHR), CJ did not make any ruling that the right of individuals to bring claims against States was incompatible with Article 344,

[42] *Electrabel SA vs Hungary*, ICSID Case No. ARB/07/19, Decision on jurisdiction, applicable law and liability, 30 November 2012, paragraph 4.112.

although the Court was aware of such a possibility. In actual fact, CJ only ruled on aspects concerning the disputes between Member States and between Member States and the European Union that enter the scope of Art. 344 TFEU.

Alternatively, even if Art. 344 TFEU applies, the subject matter of an investor-State dispute under the BIT does not concern the interpretation or application of the EU Treaties, but of the relevant provisions of the BIT whose breach is contemplated. In this respect, the Advocate General engaged in an extensive demonstration that the investment protection granted by the BIT is wider in scope than that afforded by EU treaties, rejecting thus the European Commission's submission that EU law offers investors "full protection in the field of investments".

Finally, it was outlined that recourse to international arbitration does not undermine the allocation of powers under the EU treaties or the autonomy of the EU legal system. In support of this argument, the Advocate General recalled that the courts of the Member States can intervene during the annulment, recognition and enforcement proceedings in order to ensure the uniform interpretation of EU law where necessary.

Surely, such a scrutiny is not available with respect to the ICSID arbitral awards, hence, it cannot be inferred from here that EU law does not provide an efficient remedy against the enforcement of an award that is contrary to EU public order. The apparent absence of control by the EU courts over ICSID awards finds its counter-argument in the infringement procedure under Article 258 TFEU or in the direct actions brought by the Member States against other Member States by virtue of Article 259 TFEU.

4. Conclusions

Food for thought … this is how we can characterize for the time being the Opinion of the Advocate General Wathelet in *Achmea*.

The CJ's preliminary ruling in *Achmea* will definitely put an end to the legal uncertainty intra-EU investors are exposed to. In case CJ sustains the European Commission's stance, the protection of intra-EU investments will have to be reconsidered as the EU law does not offer the "full protection" claimed in support of the argument that intra-EU BITs are superseded by the EU Treaties.

A feasible solution aiming to remove the insecurity existent in the field of intra-EU investments was already advanced, in April 2016, by the delegations of Austria, Finland, France, Germany and the Netherlands in a "non-paper" presented to the EU Council's Trade Policy Committee[43]. The non-paper militates for a single agreement between all Member States which should provide for a "*phasing-out of existing intra-EU BITs*" and an appropriate "*investment protection after*

[43] Available at: https://www.rijksoverheid.nl/binaries/rijksoverheid/documenten/publicaties/2016/05/18/non-paper-investeringsbescherming-tussen-eu-lidstaten/intra-eu-investment-treaties-non-paper.pdf

the phasing-out of intra-EU BITs." The "non-paper" is in favor of a binding and enforceable ISDS mechanism, three alternatives being envisaged in this respect: (1) to confer jurisdiction to the CJEU based on Article 273 TFEU; (2) to model the dispute settlement system of the Unified Patent System; (3) to rely on the Permanent Court of Arbitration (PCA) and agree on a "*compromis*" within the meaning of the 1907 Hague Convention.

Lastly, in case the Court of Justice embraces the AG Wathelet's Opinion in *Achmea*, the future of intra-EU investments will be far from being clearly shaped. Member States are already polarized on this sensitive topic and some of them are strongly determined to regain the control of their investment treaties. In any event, handling the issue of intra-EU investments will be a difficult task considering that some Member States have already terminated their intra-EU BITs and others have taken consistent steps in this respect. Notwithstanding the right of the States to denounce or reshape their existing investment treaties, a proactive, constructive and more structural approach is still desirable in order to secure the intra-EU investment protection framework.

REFERENCES

[1] T. T. Andersen, S. Hindelang, *The Day After: Alternatives to Intra-EU BITs*, The Journal of World Investment & Trade, Volume 17, Issue 6, 2016

[2] F. Baetens, *Investment Law within International Law: Integrationist Perspective*, Cambridge University Press, 2013

[3] J. Basedow, *EU Law in International Arbitration: Referrals to the European Court of Justice*, Journal of International Arbitration, Vol. 32, 2015

[4] T. Fecak, *International Investment Agreements and EU Law*, Wolters Kluwer, 2016

[5] P. Paschalidis, *Arbitral tribunals and preliminary references to EU Court of Justice*, Arbitration International Advance Access published July 31, 2016

[6] S. Schill, *International Investment Law and Comparative Public Law,* Oxford University Press, 2010

[7] S. Schill, *In Defense of International Investment Law*, ACIL Research Paper 2017-09

[8] C. Schreuer, Full Protection and Security, Journal of International Dispute Settlement, Volume 1, Issue 2, 2010

[9] T. Schultz; C. Dupont, Invest*ment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study*, The European Journal of International Law Vol. 25 no. 4, 2015

[10] P. Strik, *Shaping the Single European Market in the Field of Foreign Direct Investment*, Hart Publishing, 2014

[11] A. Toma-Bianov, *ICSID Arbitral Tribunals and the Direct Referrals to the Court of Justice of the European Union*, Mealey's International Arbitration Report, Vol. 31, no. 10, 2016