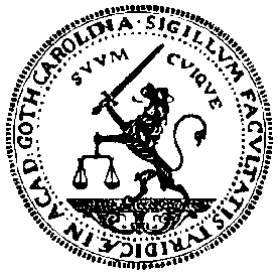

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The compatibility of ISDS clauses in intra-EU disputes with EU law

An analysis of the extent of application of the Achmea judgement on bilateral and multilateral investment treaties

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Contents

Summary

Within the area of international investment law, investor-state dispute settlement (ISDS) clauses are commonly used in order to provide investment protection. The ISDS mechanism can be described as a system under which an investor can arbitrate a dispute against a host state, based on an investment agreement concluded between the host state and the national state of the investor. As this system has been commonly used in bilateral investment treaties between EU Member States, the question of the compatibility of those provisions with EU law emerged in the Achmea judgement. This provided the fundamental basis for the research questions in this thesis.

The purpose of this thesis is to analyse the extent of the application of the Achmea judgement and the effects on the future of investment arbitration within the EU. In order to approach the applicable sources appropriately, the comparative methodology is applied. The perspective will be an internal EU perspective, compared with a public international perspective, thereby outlining the differences in the approach.

Firstly, this thesis analyses the argumentation by the Court of Justice of the EU in the Achmea judgement. Thereby demonstrating the importance of the exclusive jurisdiction of the Court of Justice of the EU and the autonomy of the EU legal order. Secondly, the extent of the application of the Achmea judgement is researched particularly regarding the *Energy Charter Treaty*, as it demonstrates a treaty signed by the Member States and the EU individually. This presents the divergence of the opinions between the EU institutions and the international tribunals. Thirdly, this divergence is further analysed, which indicates the practical effects of the issue regarding the compatibility of the existence of the ISDS mechanism within the EU. The reliability on investment arbitration within the EU is at the core of the concluding analysis.

Sammanfattning

”*Investor-state dispute settlement*” (ISDS) bestämmelser är vanligt förekommande i internationella investeringsavtal för att säkerställa det avtalade investeringsskyddet. ISDS systemet innebär att en investerare direkt kan påkalla ett skiljeförfarande mot en EU medlemsstat, baserat på det underliggande investeringsavtalet. Bilaterala investeringsavtal som innehåller en sådan ISDS klausul är vanligt förekommande mellan EU medlemsstater och med anledning av detta uppstod frågan om dessa ISDS klausuler är förenliga med EU-rätten. Denna fråga sattes på sin spets i Achmea-fallet, vilket är den grundläggande bakgrunden till denna uppsats.

Syftet med uppsatsen är att analysera Achmea-fallet och dess tillämpningsområde samt de praktiska effekter som har uppstått för skiljeförfaranden gällande investeringsskydd inom EU. De källor som används i denna analys kräver en tillämpning av den komparativa metoden. Vidare appliceras ett internt EU-rättsligt perspektiv och ett folkrättsligt perspektiv, som därefter ställs mot varandra genom användningen av den komparativa metoden.

Inledningsvis analyseras EU-domstolens argumentation i Achmea-fallet, vilket framhäver vikten av EU-domstolens exklusiva jurisdiktion samt EU-rättens autonoma ställning. Därefter, analyseras hur extensivt Achmea-fallet kan tillämpas, särskilt i förhållande till *Energy Charter Treaty* som är ett exempel på ett multilateralt investeringsavtal som har tillträtts av både EU-medlemsstater och EU. Denna analys återspeglar de splittrade åsikterna av EU-institutioner och internationella skiljedomstolar gällande Achmea-fallets tillämpningsområde. Avslutningsvis analyseras denna splittring ytterligare baserat på den komparativa metoden, vilket leder till en analys av de praktiska effekterna på ISDS klausulers förenlighet med EU-rätt. Uppsatsens slutsats sätter diskussionen om förutsebarhet i investeringsrelaterade tvister inom EU på sin spets.

Abbreviations

AG	Advocate General of the Court of Justice of the European Union
BGH	Bundesgerichtshof
BITs	Bilateral Investment Treaties
CCP	Common Commercial Policy
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
ICS	Investment Court System
ICSID	International Centre for Settlement of Investment Disputes
ISDS	Investor-State Dispute Settlement
OJ	Official Journal of the European Union
para.	paragraph
pg.	page
SCC	The Arbitration Institute of the Stockholm Chamber of Commerce
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UNCITRAL	United Nations Commission in International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development

UNTS	United Nations Treaty Series
VCLT	Vienna Convention on the Law of Treaties
WM	Zeitschrift für Wirtschafts- und Bankrecht
ZB	Beschluss des Zivilsenats

1 Introduction

1.1 Background

In 2018 the German Federal Court of Justice (*Bundesgerichtshof*) requested a preliminary ruling from the Court of Justice of the European Union (CJEU) which resulted in the *Achmea judgement*[1]. The case concerned the compatibility with European Union (EU) law of an intra-EU investor-state dispute settlement (ISDS) mechanism laid out in a bilateral investment treaty (BIT).[2] BITs are agreements between two states providing substantive standards for the protection of foreign investment, and the enforcement thereof is ensured though dispute settlement procedures.[3] The focus of this thesis will be on the provision on ISDS, where a foreign investor can directly submit violations of BITs by a host state to international arbitration. A host state is the contracting party where the foreign investor has made its investment. ISDS clauses are commonly used in BIT's and multilateral investment treaties.[4] Consequently, the ruling was highly debated within the Member States of the EU (Member States) as most of these countries have concluded such BITs. The case in general confirmed the monopoly on dispute settlement laid out in the *Treaty on the European Union*[5] (TEU) and the *Treaty on the Functioning of the European Union*[6] (TFEU) (jointly referred to as the "Treaties") and also declared ISDS clauses as incompatible with EU law.[7]

[1] C- 284/16 *Slowakische Republik v Achmea B.V.*, Judgement of 6 March 2018, EU:C:2018:158 [cited *Achmea judgement*].
[2] Ibid, para. 1-5.
[3] UNCTAD, '*Bilateral Investment Treaties 1995-2006 Trends in Investment Rulemaking'*, United Nations New York and Geneva, 2007, UNCTAD/ITE/IIT/2006/5, pg. 141.
[4] Ibid, pg. 100.
[5] Treaty on the European Union, Consolidated Version 2016, OJ C 202, 7.6.2016 [cited TEU].
[6] Treaty on the Functioning of the European Union, Consolidated Version 2016, OJ C 202, 7.6.2016 [cited TFEU].
[7] *Achmea judgement*, para. 60.

The ruling is based on the objectives of the EU and the role of the CJEU within that system. Further, the principle of conferral plays a significant role in the argumentation of the CJEU. In short, the principle of conferral means that the EU only shall act when the competences have been conferred upon them by the Member States.[8] This relationship between the EU legal order and national legal systems has arisen through the Treaties, regulations, directives and case-law over the years outlining the scope of EU law. In order to secure the role of the CJEU and the possibility of achieving the objectives agreed upon by the Member States, the EU set up a system of exclusive jurisdiction laid out in article 344 TFEU as well as the preliminary ruling system in article 267 TFEU. Further, the Member States have an obligation under article 351 TFEU to minimise the incompatibilities of other international agreements, which they have entered into individually, with EU law. These principles are at the core of the discussion of the compatibility of ISDS clauses with EU law.[9]

Furthermore, the Achmea judgement touches upon another area of law which is international investment law. There is an immense amount of international investment agreements, containing similar dispute settlement clauses as the one declared incompatible in the Achmea judgement, including agreements entered into by the EU itself.[10] The question of compatibility of ISDS clauses is particularly interesting in regard to the *Energy Charter Treaty*[11] (ECT), as it is an international agreement entered into by both the Member States and the EU. This certainly raises questions and concerns on how the Achmea judgement shall be interpreted and applied on ISDS clauses in a multilateral treaty, such as the ECT. Consequently, the applicability of the Achmea principle is the basis of the heated debate and the inspiration for this thesis. The strong opinions of international tribunals on this matter intensified the

[8] Article 5.2 TEU.
[9] See article 267, 344 and 351 TFEU.
[10] UNCTAD, '*Bilateral Investment Treaties 1995-2006 Trends in Investment Rulemaking'*, United Nations New York and Geneva, 2007, UNCTAD/ITE/IIT/2006/5, pg. 100-101.
[11] Energy Charter Treaty, Lisbon, 17 December 1994, 2080 UNTS 95 [cited ECT].

desire to research this question in detail, thereby revealing the substantial effects on investment arbitration within the EU.

1.2 Purpose

The purpose of this thesis is to analyse the extent of the applicability of the Achmea judgement on other intra-EU BITs as well as multilateral treaties such as the ECT. In detail, this concerns the question of whether all ISDS provisions in intra-EU disputes shall be declared incompatible based on the arguments brought forward in the Achmea judgment. The argumentation is fundamentally based on the principle of conferral whereby the exclusive jurisdiction of the CJEU is derived. In order to determine the extent of the applicability of this judgement, the argumentation must be compared to the perspective of international investment law, specifically in regard to the status of ISDS clauses in international agreements. It is an attempt to analyse the future of the ISDS mechanism within the EU and the effects on investors and Member States created by the Achmea judgement.

1.3 Research question

In order to achieve the purpose of the thesis outlined above the following questions must be answered, where question 1-2 represent preliminary questions which must be answered in order to answer the main research question outlined in question 3.

1) *On what legal arguments does the CJEU consider intra-EU ISDS clauses as incompatible with EU law?*

   In order to understand the argumentation in the Achmea judgment the background and the legal basis of the ruling must be presented. Thus, this question is essential in order to determine the extent of the application of this judgment and thereby compare the distinction of argumentation presented by the EU institutions and international tribunals in regard thereto.

2) *How would the application of the Achmea judgement play out when applied to multilateral treaties and the ISDS clauses contained therein?*
   As the purpose is to analyse the extent of the applicability of the Achmea judgement on multilateral treaties such as the ECT, the allocation of competences between the EU and the Member States must be presented. Thereby, further analysing the arguments brought forward both by the EU institutions and international tribunals regarding the applicability of the Achmea judgement on ISDS clauses in the ECT.

3) *Can the Achmea judgment be applied to multilateral treaties and still be compatible with the Member States obligations under international law?*
   This question is the core question of this thesis as it is the concluding analysis, taking into account the EU perspective as well as the international law perspective that has been previously presented in the earlier sections. In general, it presents an analysis of the practical impact of the divergence of the opinions based on the adaption of respectively the EU law and public international law perspective regarding ISDS clauses in intra-EU disputes.

1.4 Perspective and method

In order to answer the research questions in this thesis, the legal duties of the Member States under EU law as well as international law must be determined. This requires the application of a comparative methodology as the compatibility of the obligations under EU law, including the Achmea judgement, will be determined in regard to the obligations conferred upon the Member States under international law.[12] The comparative methodology is often applied in order to compare national legal systems of different countries. However, as EU law is an autonomous legal order and public international

[12] Korling, F., Zamboni, M., *Juridisk Metodlära*, Studentlitteratur, Lund, 2013 [cited Korling & Zamboni], pg. 122.

law also is a legal system of its own nature, this methodology can be applied.[13] The comparative methodology will be utilised in order to determine similarities and differences in the argumentation of the presented cases which then will be used to determine the practical effect of these differences on investment arbitration and ISDS clauses within the EU.[14]

Various perspectives can be applied when touching upon different areas of law as in this thesis, predominantly EU law and international law. In order to answer the specific research questions of this thesis the EU perspective will be applied. The EU perspective in this case means that the objectives and principles of the EU and the fulfilment of the obligations taken thereunder will be the main focus, thus it is an internal EU view. This will be particularly applied in the detailed analysis of the Achmea judgement. This perspective is similar to the teleological interpretation utilised by the CJEU and the EU legal system in its entirety.[15] The thesis proposes an analysis of the compatibility of international dispute settlement clauses with the exclusive jurisdiction of the CJEU and therefore other perspectives such as the international legal perspective must be considered. Consequently, the obligations of Member States under international law will be determined and analysed both from an EU law perspective as well as the perspective of the international tribunals. While applying these perspectives to the various sections throughout the thesis, the comparative methodology will constantly be applied. This will specifically be apparent in the concluding analysis of the thesis, where the differing opinions of the EU institutions and international tribunals are compared. This requires the application of the comparative methodology on the differences between the argumentation of the EU and its institutions on one hand and the international tribunals on the other. Through the application of this methodology the final research question on the compatibility of the Achmea judgement with the obligations of the Member States under

[13] Korling & Zamboni, pg. 141–142.
[14] Ibid, pg. 141.
[15] Ibid, pg. 122; see case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, Judgement of 6 October 1982, EU:C:1982:335, for criteria on teleological interpretation.

international law can be answered and the effects on the ISDS mechanism within the EU can be determined.

1.5 Material

As this thesis is based on a judgement from the CJEU it requires the study of the EU legal sources which comprise of primary law, secondary law, general principles of EU law and case law. The rulings by the CJEU are of particular interest as it is through case law that many of the EU principles are confirmed.[16] In the analysis of these sources other non-binding materials will be used, including doctrine, journal articles and opinions from different EU institutions. The Achmea judgement provided the basis of this thesis and therefore non-binding materials will be used in order to expand the understanding of the practical impact of the judgement. This material is non-binding and can therefore not be the sole source, nevertheless, such material can within the EU legal system have a normative effect especially if there is a lack of other material for the interpretation of the EU sources.[17]

Awareness of the practical complexity of the Achmea judgement, is a prerequisite for the successful analysis of the research questions. In order to obtain as much knowledge as possible other online sources have been used such as articles in newspapers as well as blogs. These sources must be used carefully, and no binding nature can be applied.

Further this thesis includes the analysis of international law, particularly international investment law and dispute settlement clauses. The materials used in that aspect are bilateral investment agreements as well as the ECT. Decisions from international tribunals, predominantly from the *International Centre for Settlement of Investment Disputes* (ICSID) and the *Arbitration Institute of the Stockholm Chamber of Commerce* (SCC) will be used in order

[16] See Case 26/62 Van Gend en Loos, where the CJEU determined that the EU legal system is its own system in the international legal arena.
[17] Korling & Zamboni, pg. 127.

to grasp the international issue of dispute settlement clauses in relation to EU law. In order to obtain an overview of the international investment law area material from the *United Nations Conference on Trade and Development* (UNCTAD) will be used, specifically for the historical development of foreign direct investments and BITs.

Corresponding to the material used for EU law, online sources are further utilised in regard to the international investment law area, specifically in order to determine the discussions and practical impact of certain rulings by international tribunals. These sources are used carefully and have only been adapted for inspiration and a practical perspective on the entire area touched upon by the cited cases.

1.6 Delimitations

The exclusive jurisdiction of the CJEU is a highly debated topic touching upon several legal areas, thus there are various perspectives that can be applied. However, the focus will be the EU and its objectives as well as public international investment law. Other legal areas such as national procedural law will be disregarded to a great extent. The application of other perspectives than those outlined above will most definitely lead to a differing analysis and conclusion of this topic. Thus, these perspectives cannot be presented within the scope of this thesis as they require a separate full analysis. Furthermore, this thesis focuses on intra-EU investor-state disputes, therefore will extra-EU and intra-state disputes be disregarded to a great extent and only be presented when necessary in order to entirely satisfy the research questions. Some reference to extra-EU BITs is however necessary in order the follow the recent line of argumentation by the CJEU regarding the compatibility of ISDS clauses.

1.7 Research status

As this topic touches upon different legal systems and provisions, the research status on those individual provisions is quite extensive. There are several journal articles and academic research concerning the relationship between EU law and international law and the monopoly on dispute settlement.[18] Nevertheless, the question on the compatibility of intra-EU ISDS clauses has not been fully answered and the hope was that the Achmea judgment finally would provide a solution. However, a lot of questions remained after the Achmea judgement and confusion regarding the interpretation of the judgement lead to a heated debate especially in the online sources, journal articles but also opinions from international tribunals. The legal certainty was in the centre of the debate and the opinions differed immensely between those adapting an EU perspective and those adapting an international law perspective.

The presented research questions aim to determine the argumentation put forth criticising the Achmea judgement and the solution found therein and aiming at discussing the extent of the application on the ECT. The argumentation for the critique will be based on the arguments put forth by international tribunals. The Achmea judgement has been preceded by other cases which further develop the applied principle. There are pending cases where the hope is for the CJEU to rule on the extent of the application of the Achmea judgement, specifically concerning the ECT. Followed by the heated debate of the topic of the applicability of the Achmea judgement, the research expanded within several different areas of law.[19]

[18] See e.g. Hillion C. & Wessel R.A. *The European Union and International Dispute Settlement: Mapping Principles and Conditions*, published in Cremona M., Thies A. & Wessel R.A. *The European Union and International Dispute Settlement*, Oxford, Hart Publishing, 2017; Zang M.Q. *Shall We Talk? Judicial Communication between the CJEU and WTO Dispute Settlement*, The European Journal of International Law Vol. 28 no. 1 pg. 273-293.

[19] See e.g. Nagy CI. *Intra-EU Bilateral Investment Treaties and EU Law after Achmea: Know Well What Leads You Forward and What Holds You Back*, German Law Journal. 2018, Issue 4:981 [cited Nagy]; Vajda C. *Achmea and the Autonomy of the EU Legal Order*, LAwTTIP Working Papers 2019/1.

1.8 Outline

In short, this thesis can be separated into four main sections where the first section focuses on the exclusive jurisdiction of the CJEU and the importance thereof. The role of the CJEU will be outlined, focusing on the monopoly on dispute settlement and the objectives of the EU. This is necessary in order to understand the CJEU's argumentation in the Achmea judgment and the compatibility of ISDS clauses in intra-EU BITs.

The second section focuses on the role of BITs in general within the EU legal system, requiring a brief historical background, and determining the validity thereof and the allocation of competences between the EU and its Member States. Leading on to the Achmea judgement itself and the argumentation brought forward in determining the compatibility of intra-EU ISDS clauses. Naturally, this section will in general be based on the internal EU perspective.

The third section focuses on the application of the Achmea judgment on multilateral treaties and the compatibility of their ISDS clauses with EU law, both from an EU perspective and public international law perspective. This requires an introduction of the allocation of competences between the Member States and the EU in the area of international investment agreements and investment law. Followed by an introduction of the ECT as it will be used as an example of a multilateral treaty to which both the EU and the Member States are contracting parties. The compatibility of the ISDS clause therein will be discussed both from an internal EU law perspective as well as the perspective outlined by international tribunals. This will provide for the further analysis of investment arbitration within the EU.

Concluded by the fourth section containing the analysis and the conclusion of the facts and information presented in the previous sections. It will focus on the impact of the Achmea judgement on other treaties, such as the ECT. The arguments put forward by the EU respectively the international tribunals will be analysed and compared. Lastly, the future of the ISDS mechanism and

reliability on investment arbitration within the EU will be at the core of the conclusion of this thesis, based on the diverging opinions of the EU institutions and international tribunals on the extent of application of the Achmea judgment.

2 The exclusive jurisdiction as an enforcement mechanism

This section will focus on the exclusive jurisdiction of the CJEU. In order to fully grasp the importance of the monopoly on dispute settlement one must understand where this monopoly stems from. Thus, this section provides an overview of the CJEU, its role within the EU legal system and methods provided in the Treaties which enable the enforcement of EU law, focusing on those provisions that become relevant in the discussion of intra-EU investment arbitration.

2.1 The EU is based on the principle of conferral

The EU itself was established through the TEU, whereby the contracting parties conferred competences to the EU in regard to common objectives of the Member States.[20] Only competences specifically conferred through the Treaties will empower the EU, while competences that have not been conferred onto the EU in the Treaties will remain with the Member States pursuant to article 4 TEU. The common objectives of the EU sets the outer frame of the powers of the EU, as it only shall act within the limits of the conferred competences, in order to attain the objectives set out in the Treaties.[21] The EU must therefore link its measures to a provision in the Treaties wherein it specifically was empowered to adopt that measure.[22] In addition, the principle of subsidiarity and proportionality are corollary principles of the principle of conferral and together they determine to what extent the EU can use its competences conferred upon it. In short, three

[20] Article 5 TEU.
[21] Article 5.2 TEU.
[22] See Opinion 2/00 *Cartagena Protocol on Biosafety*, Opinion of 6 December 2001, EU:C:2001:664, para. 5; C-370/07 *Commission v Council*, Judgement of 1 October 2009, EU:C:2009:590, para. 47.

conditions must be fulfilled in order for the action to be in compliance with EU law. Firstly, the action must form part of the competences that have been conferred upon the EU in the Treaties, as set forth above. Secondly, if competences are shared with the Member States, then the EU must be the most relevant actor in order to achieve the objectives. Lastly, the content and the form of the action shall not go further than necessary for the fulfilment of the objectives.[23] Furthermore, the idea of conferral not only contains the fact that the EU should act within the powers conferred on it, but also the fact that the EU should receive the powers necessary to fulfil the tasks assigned to it by the Treaties.[24]

When it is established that powers have been conferred upon the EU, the competence can fall within one of the following categories: exclusive, shared or supporting competence.[25] Exclusive competence means that only the EU itself has competence in that area and the Member States has conferred its entire competence in that area to the EU. This is established in article 2.1 TFEU which carries the consequence that only the EU can legislate and adopt legally binding acts and Member States can only do so in order to implement EU acts or if the EU specifically allows it to adopt any other legal acts.[26] In regard to shared competence both the Member States and the EU can act, as set out in article 2.2 TFEU. The Member States must, however, while acting within shared competence always comply with EU law. Shared areas of competence are further specified in article 4 TFEU. Supporting competence means that the EU establishes broad goals in that area, while the Member States still retain their exclusive regulatory power. This demonstration may imply that it is easy to differentiate between these powers, in practise differentiation between these categories and the borders between them brings forth several complex considerations.[27]

[23] Article 5 TEU.
[24] Craig & De Búrca, *EU Law Test, Cases and Materials*, sixth edition, Oxford University Press, 2015 [cited Craig & De Búrca], pg. 74.
[25] Article 2 TFEU.
[26] Ibid.; Craig & De Búrca, pg. 78.
[27] Craig & De Búrca, pg. 78.

2.2 The objectives of the EU

As set out above the EU shall only act in order to achieve the set-out objectives in the Treaties that the Member States have agreed on. Currently there are several objectives included in the Treaties, mainly in article 3 TEU, stating that the EU shall create and maintain an internal market, establish an economic and monetary union, offer its citizens an area of freedom, security and justice without internal frontiers, in which the freedom of movement of people is ensured and many more. These objectives are the foundation of the actions of the EU and all actions shall be based on achieving them.[28]

Focusing on the objectives and foreign investments an important EU value is that all EU law shall be based on the rule of law, as set out in article 2 TEU. This means that all actions by the EU shall be founded on the Treaties which have been outlined by the Member States. The enforcement of EU law is further ensured by an independent judiciary, in this case the CJEU, which ensures the applicability of the rule of law. The jurisdiction to the CJEU has been agreed upon by the Member States, based on article 19 TEU and articles 251-281 TFEU. Consequently, the jurisdiction as defined in the Treaties, ,including the monopoly on dispute settlement established in article 344 TFEU, has been agreed upon by the Member States in order to achieve the common objectives.[29]

2.3 The role of the CJEU within the EU legal system

With the principle of conferral and the common objectives in mind, it has been presented that the CJEU plays a vital role in the EU legal system, aiming at the fulfilment of the common goals. The main role of the CJEU is to ensure that the law is applied when interpreting and applying the Treaties, as set out

[28] See article 3.6 TEU.
[29] See article 2 and 9 TEU and 251-281 TFEU.

in article 19 TEU. The CJEU shall rule on actions brought by a Member State, an institution or a natural or legal person, give preliminary rulings based on the reference system laid out in article 267 TFEU and rule in other cases that are provided for in the Treaties.[30] It is the CJEU which has developed important principles, predominantly through the reference system, such as the principle of direct effect and supremacy, which are principles that are peculiar to the EU legal system in comparison to other international treaties. As mentioned above one of the objectives of the EU is to ensure that the rule of law is applied within the EU legal system. In order to ensure that the rule of law is applied the CJEU has developed principles of constitutional nature as part of EU law which are binding on the EU institutions as well as the Member States when acting within the sphere of EU law.[31] The success of EU integration has been highly dependent upon the capacity of the EU to develop organisational structures and systems in order to achieve the common objectives.[32] Nevertheless, the CJEU has not consistently been active, the frequency varies from time to time and also from different policy areas. The CJEU is in its rulings aware of the political environment that it affects during that time, leading to rulings which are influenced by more political arguments rather than legal arguments. Such arguments can include the financial effect of a ruling, or the critique of the public and other national sources.[33] The activism of the CJEU has repeatedly been approved by Member States through Treaty revisions.[34] The Member States can thus be regarded as the driving forces behind the integration process. The CJEU's power has been accepted and it is of great importance as it removes the possibility of Member States undermining the EU system by attaining the privileges of the EU membership without fulfilling their obligations as part of that membership.[35]

[30] Article 19.3 TEU.
[31] Craig & De Búrca, pg. 63.
[32] Stone Sweet A., "*The judicial Construction of Europe"*, Oxford University Press, 2004, pg. 238-239; See further Craig & De Búrca, pg. 66.
[33] Craig & De Búrca, pg. 63.
[34] Ibid, pg. 64.
[35] Ibid, pg. 65.

2.4 Methods of action within the role of the CJEU

The presented principle of conferral, objectives of the EU and the role of the CJEU as an enforcement mechanism of those objectives, establishes the fundamental basis of the exclusive jurisdiction of the CJEU which is at risk in the Achmea judgement. In order to understand the argumentation of the CJEU regarding the compatibility of intra-EU ISDS clauses with EU law, specific provisions of the CJEU regarding the exclusive jurisdiction must be presented, as the analysis of the judgement requires an understanding of the CJEU as an enforcement mechanism, and the underlying provisions establishing that mechanism. There are certain provisions in the Treaties providing methods to ensure the enforcement of EU law such as article 267 and 344 TFEU which provide the basis for the argumentation of the CJEU in the Achmea judgment, and other rulings regarding the extent of the exclusive jurisdiction of the CJEU, and therefore will shortly be presented below.

2.4.1 Ensuring the harmonious interpretation and application of EU law and duty of providing effective judicial protection

In light of the objectives of the EU as set forth above as well as the role of the CJEU the reference system is a tool in achieving the objectives. Article 267 TFEU states that the CJEU shall have the jurisdiction to give preliminary rulings concerning the interpretation of the Treaties as well as the validity and interpretation of acts of institutions, bodies, offices and agencies of the EU. This reference system provides a method of uniform interpretation and application of EU law, which is based on the principle of conferral as laid out in article 4-5 TEU. Article 267 TFEU provides the option for national courts of the Member States to refer a question to the CJEU if the case calls upon it. Furthermore, the duty to refer a question can arise if a case concerns the interpretation of the Treaties pending before a court or tribunal against which

there is no judicial remedy under national law.[36] In most jurisdictions this would affect the highest courts, however, in some specific cases it can be a lower court if there is no possibility of appealing the decision or any other remedies made available for the applicant.[37]

In order to ensure the enforcement of EU law and the harmonious interpretation and application of EU law the reference system under article 267 TFEU must be ensured through the Member States providing courts and tribunals which can refer such questions to the CJEU. This is ensured through article 19 TEU which obliges the Member States to provide remedies to ensure effective legal protection in the areas covered by EU law. The CJEU has in its case-law claimed that the principle of effective judicial protection constitutes a general principle of EU law stemming from the constitutional traditions common to the Member States, as laid out in article 6 and 13 of the *European Convention on Human Rights*[38] (ECHR) and reaffirmed by article 47 of the *Charter of Fundamental Rights of the European Union*[39].[40] This leads to the interpretation that the article 19 TEU obligates the Member States to provide a guarantee of judicial independence. The importance of this provision in general entails that the Member States must provide "courts or tribunals" in compliance with the concept as defined as qualifying bodies entitled to send preliminary references to the CJEU under article 267 TFEU. This puts an obligation on the Member States to ensure that cases that are covered by EU law will be decided upon by a body of a certain nature, quality and hierarchy.[41] The case *Associação Sindical dos Juízes Portugueses*[42] in general obliges the Member States to ensure that all bodies that could potentially rule, even if only occasionally, on an issue covered by EU law,

[36] See article 267.3 TEU.
[37] Case 6/64 *Flamino Costa v E.N.E.L.*, Judgment of 15 July 1964, EU:C:1964:66, pg. 599.
[38] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), Council of Europe, Rome, 4 November 1950, *ETS 5*, [cited ECHR].
[39] Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02.
[40] C-64/16 *Associação Sindical dos Juízes Portugueses*, Judgement of 27 February 2018, EU:C:2018:117, para 35.
[41] Ibid, para. 38.
[42] C-64/16 *Associação Sindical dos Juízes Portugueses*, Judgement of 27 February 2018, EU:C:2018:117.

thus within the scope of EU law, are set up as "courts or tribunals" and thereby fall within the EU judicial system. In short, the CJEU thereby prevents the application of any rules other than those laid out in EU law in fields, falling within the scope of EU law by connecting article 19 TEU and article 267 TFEU to each other.[43]

2.4.2 The monopoly on dispute settlement as an enforcement mechanism

In addition to the reference system under article 267 TFEU the exclusive jurisdiction of the CJEU is set forth in Article 344 TFEU obligating the Member States not to submit disputes concerning the interpretation or application of the Treaties to any other method of settlement that is not provided for in the Treaties. This is an important aspect of the full enforcement of EU law and the role of the CJEU as one of its tasks is to ensure that EU law is observed in the interpretation and application of the Treaties, which is of fundamental importance for the EU legal order.[44] This jurisdiction is meant to be exclusive and any dispute regarding the interpretation or application of EU law brought before any other method of settlement will be in breach of that provision.[45] Disputes that fall outside of the scope of EU law will not be covered by the exclusive jurisdiction and thus the CJEU cannot claim a monopoly on the settlement of such issues.[46]

2.4.3 The scope of EU law

It is clear from the above mentioned that the relevant factor determining the applicability of the exclusive jurisdiction of the CJEU is whether the actions fall within the scope of EU law. Measures and areas which are not within the scope of EU law can thus not be argued as being covered by the exclusive

[43] Ibid, para. 40
[44] Opinion 2/13 *Accession of the European Union to the ECHR*, Opinion of 18 December 2014, EU:C:2014:2454 [cited Opinion 2/13], para. 106.
[45] See Opinion 1/91 *First Opinion on the EEA Agreement*, Opinion of 14 December 1991, EU:C:1991:490 [cited Opinion 1/91], para. 46; Opinion 2/13, para. 111.
[46] C-459/03 *Commission v Ireland*, Judgement of 30 May 2006, EU:C:2006:345, [cited *MOX Plant* case], para. 135.

jurisdiction of the CJEU, which also is the deciding factor in the compatibility of intra-EU ISDS clauses. However, the scope of EU law is wider than simply the implementation of EU law.[47] The CJEU submitted several cases whereby the scope of EU law has been outlined in certain legal areas. A landmark case is the ruling in *Åkerberg Fransson*[48] where the CJEU determined the scope of EU law in regard to fundamental rights.[49] Evidently the CJEU plays a vital role in determining the scope of the EU and thus, also the application of the monopoly on dispute settlement.

Over the years the CJEU has been criticised for bringing political arguments into its rulings.[50] The role of the CJEU is similar to the role of constitutional courts as in Germany or the United States of America and the CJEU thus must take into considerations other factors such as the political environment and the EU system as a whole and the harmonious development thereof.[51] In many rulings it is demonstrated that the CJEU itself sees EU law as a mechanism and system which constantly is developing over time dependent upon the integration process. The fact that most EU law is developed through the case-law by the CJEU eases the adjustment to the constant changes of society.[52] However, in regard to the area of investment arbitration and ISDS clauses there has been a long wait for the CJEU to rule on the matter. The hope was that the Achmea ruling would outline the scope of EU law in regard to ISDS provisions, and thus its effects and applicability have been immensely debated, which will be further outlined below.[53]

[47] C-617/10 *Åklagaren v Åkerberg Fransson*, Judgement of 26 February 2013 EU:C:2013:105 [cited *Åkerberg Fransson*], para. 22–28.
[48] C-617/10 *Åklagaren v Åkerberg Fransson*, Judgement of 26 February 2013.
[49] Ibid, para. 22–31.
[50] Hettne J. & Otken Eriksson I., *EU-rättslig metod - Teori och genomslag i svensk rättstillämpning*, Nordstedts Juridik AB, Visby, 2011, second edition, pg. 59.
[51] Ibid.
[52] Ibid, pg. 60.
[53] See *Achmea judgment*, para. 15-21 for the request made by the German Federal Court of Justice.

3 Determining the compatibility of ISDS clauses in intra-EU BITs with EU law

In order to understand the line of argumentation of the CJEU, in regard to the compatibility of ISDS clauses in international investment agreements, a short introduction and history of bilateral investment agreements in Europe is required. The status of those agreements over time within the EU legal order will be presented, demonstrating that the status varies dependent on two main factors. Firstly, the timing of the conclusion of the treaty in comparison to the time of accession to the EU. Secondly, whether both parties have acceded to the EU. This discussion will lead on to the Achmea judgement and the specific argumentation therein, in order to outline the key arguments and principles determining the compatibility of ISDS clauses pursuant to the Achmea judgement.

3.1 Brief History of BITs in Europe and compatibility with EU law

BITs are agreements entered into by two states whereby reciprocal provisions are established in order to regulate foreign direct investments (FDI), concluded by foreign investors of the other contracting party.[54] FDI is a measure by foreign investors of developed, capital-exporting countries to pursue opportunities in another country in order to receive the highest returns on their investments and strengthen their position in emerging markets.[55] Whereas capital-importing and developing countries wish to attract capital flows and new technologies in order to improve their economies and their

[54] UNCTAD, '*Bilateral Investment Treaties 1959-1999'*, United Nations New York and Geneva, 2000, UNCTAD/ITE/IIA/2, pg. 1.
[55] Ibid.

status on the global market.[56] After World War II countries in Europe started negotiating treaties that dealt with foreign investments and the number of BITs concluded have steadily increased. Several BITs were concluded between countries in Central and Eastern Europe with developed countries, in order to attract foreign investment and encourage economic development.[57] Among the developed countries Germany, France and the United Kingdom were the countries with the largest number of concluded BITs.[58] With the lack of an international investment framework the number of BITs increased further significantly since the 1990s based on the dual ambition of protecting each other's investments as well as attracting investments to their own country.[59] These agreements are specifically adjusted to the specific situation, however, their structure and general composition are often uniform. In regard to dispute settlement most BITs contain specific provisions for investment dispute resolution applicable when a contracting party breaches its obligations pursuant to the BIT.[60] In addition, BITs contain ISDS provisions, where a foreign investor can directly submit violations of BITs by a host state to international arbitration as set out in the treaty itself.[61] In most cases the chosen forum is the ICSID, which was established in 1965 specifically for the purpose of resolving disputes between host countries and foreign private investors.[62]

The area of investment law was long within the competence of the Member State but the *Lisbon Treaty*[63] transferred the competence over FDI from the Member States to the EU by stating that it forms part of the EU's Common

[56] 'World Investment Report 2018 – Investment and New Industrial Policies', UNCTAD, New York and Geneva, 2018, accessed on 5 May 2019 at, < https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf>, accessed 2019-5-01, pg. 12.
[57] UNCTAD, '*Bilateral Investment Treaties 1959-1999*', United Nations New York and Geneva, 2000, UNCTAD/ITE/IIA/2, pg. 1.
[58] Ibid, pg. 17.
[59] UNCTAD, '*Bilateral Investment Treaties 1995-2006 Trends in Investment Rulemaking*', United Nations New York and Geneva, 2007, UNCTAD/ITE/IIT/2006/5, pg. 2.
[60] Ibid, pg. xiii.
[61] Ibid, pg. 100.
[62] Ibid, pg. 101; and article 1 of the ICSID Convention.
[63] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Lisbon, 13 December 2007, OJ C 306, 17.12.2007, pg. 1–271 [cited Lisbon Treaty].

Commerical Policy (CCP).[64] The transition from shared to exclusive EU competence created doubts about the BITs that already existed between Member States and third countries, and the CJEU in several cases ruled that Member States had infringed their obligations under article 351 TFEU to ensure the compatibility of international agreements with EU law.[65] In order to regulate the transition, the EU adopted a regulation with transitional provisions, *Regulation (EU) No. 1219/2012*[66], whereby the compatibility with EU law of the existing BITs should be ensured.[67] Some of those agreements may include provisions affecting the rules on the free movement of capital and thus the EU adopted a regulation in order to minimize the incompatibilities and adopt appropriate measures in order to remove existing incompatibilities.[68]

The Regulation further highlighted the importance of ensuring that the BITs, which were still in force at that point, would remain operational, including as regards dispute settlement whilst simultaneously respecting the EU's exclusive competence.[69] Specifically regarding dispute settlement procedures activated under the applicable BIT the Regulation states in article 13 that the Member States and the Commission shall fully cooperate in the conduct of procedures within the relevant mechanisms, which may include the participation of the Commission in the dispute settlement procedure. What this obligation would entail was not specifically laid out, and as BITs increased between Member States, as well as multilateral investment treaties signed by the EU itself, the relationship of these treaties and the EU legal

[64] Article 188 A – 188 B Lisbon Treaty.
[65] See C-249/06 *Commission v Sweden*, Judgement of 3 March 2009, EU:C:2009:119; C-205/06 *Commission v Austria*, Judgement of 3 March 2009, EU:C:2009:118; C-118/07 *Commission v. Finland*, Judgement of 19 November 2009, EU:C:2009:715; See further Craig & De Búrca, pg. 336.
[66] Regulation (EU) No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, OJ L351, 20.12.2012 pg. 40-46 [cited Regulation].
[67] Ibid, preamble 5-6.
[68] Ibid, preamble 4.
[69] Ibid, preamble 16.

order continued to be debated by various scholars.[70] BITs raise the questions of whether intra-EU investment issues are covered by EU law or national law of the Member States, if EU law precludes the applicability of national law and if intra-EU ISDS mechanisms conflict with the EU legal order.[71] In general, the fact that intra-EU BITs regulate an area which is not directly covered by EU law does not necessarily mean that it does not fall within the scope of EU law.[72] Consequently, the scope of EU law must be determined in the area of investment law and investment arbitration, which requires the study of BITs and where they shall be placed in regard to the allocation of competence between the Member States and the EU.[73]

3.2 The EU membership affects agreements concluded pre- and post-membership

Differentiating between agreements entered into before the EU membership and those agreements entered into after the EU membership is necessary in order to determine the status of the agreements within the EU legal system. Certain obligations and duties are not applicable to agreements entered into prior to EU membership. BITs concluded after a Member State became an EU member will automatically be affected by all the duties that are contained in the EU membership. Member States are through their EU membership bound by the Treaties and the objectives contained therein whereby Article 267 and 344 TFEU are some of the provisions restricting their actions which have been presented above. Article 4.3 TEU is another important provision, outlining the principle of sincere cooperation. Together with the principle on primacy this is argued to prevent the Member States from entering into international agreements containing rules conflicting with EU norms. This duty of sincere cooperation applies in areas that are covered by EU exclusivity

[70] Anderer C.E. *Bilateral Investment Treaties and the EU Legal Order: Implications of the Lisbon Treaty*, 35 Brooklyn Journal of International Law [cited Anderer], pg. 853.
[71] Ibid, pg. 865.
[72] See *Åkerberg Fransson*, para. 22-28 on the scope of EU law, as outlined in section 2.4.3 of this thesis.
[73] See section 3.2.

as well as those areas that are shared. If Member States enter into agreements or even negotiate agreements in those areas that are shared or exclusive the Member State could potentially violate EU law.[74] This question was raised in the *Inland-Waterways* cases[75] in regard to negotiations with third countries by Germany and Luxembourg. In the cases Germany and Luxembourg were found to be in breach of the duty of sincere cooperation as they concluded BITs with several third countries concerning inland waterways transport while the European Council had already adopted a mandate for the Commission to negotiate an agreement in this area. The CJEU ruled that the Member States should have consulted the Commission in this area in order to prevent the breach of their obligations under EU law.[76] The duty of sincere cooperation is of general application and does not depend on whether the area concerned is exclusive or shared, nor if the country that the BIT is concluded with is a non-EU state.[77]

This application of EU law was confirmed in the *MOX Plant* case[78] where the CJEU ruled that the duty is applicable in regard to dispute resolution as well, as Ireland should have consulted the Commission before starting dispute-resolution proceeding against the United Kingdom under the *United Nations Convention on the Law of the Sea*[79] (UNCLOS) in regard to matters falling within the competence of the EU.[80] Consequently, actions of Member States after entering into the EU will automatically be covered by the duty of sincere cooperation as it is of general application in all areas within the scope of EU law.[81] Thus, the scope of EU will ultimately, once again, determine how far this principle can be applied as the measure, the BIT itself, must fall within the scope of EU law.[82] In regard to agreements concluded prior to EU

[74] Craig & De Búrca, pg. 354.
[75] C-266/03 *Commission v Luxembourg*, Judgment of 2 June 2005, EU:C:2005:34; and C-433/03 *Commission v Germany*, Judgment of 14 July 2005, EU:C:2005:462.
[76] *Commission v Luxembourg*, para. 60; and *Commission v Germany*, para. 66.
[77] *Commission v Luxembourg*, para. 58; and *Commission v Germany*, para. 64.
[78] C-459/03 *Commission v Ireland*, Judgment of 30 May 2006, EU:C:2006:345.
[79] United Nations Convention on the Law of the Sea, United Nations General Assembly, Montego Bay,10 December 1982, No. 31363 [cited UNCLOS].
[80] *MOX Plant* case, para. 179.
[81] *Commission v Luxembourg*, para. 58; and *Commission v Germany*, para. 64.
[82] *MOX Plant* case, para. 179.

membership another provision, article 351 TFEU, will in addition to the duty of sincere cooperation be at the core of determining the obligations of the Member States as outlined below.[83]

3.3 The status of international agreements entered into by Member States prior to EU membership – article 351 TFEU

The validity of agreements entered into by a Member State before 1 January 1958, or for acceding Member States prior to its EU membership, shall not be affected by the provisions of the Treaties, as laid out in article 351.1 TFEU. The provision concerns the relationship of agreements entered prior to the EU membership with EU law and establishes that there in general is no requirement to terminate such agreements. The purpose of this provision is to make clear that the application of the Treaties does not affect the obligation of the individual Member States to respect its obligations under international law, in accordance with article 30 of the *Vienna Convention on the Law of Treaties*[84] (VCLT).[85] Nevertheless, the Member States have agreed to an obligation of eliminating any existing incompatibilities with EU law in those agreements as established in article 351.2 TFEU. This provision is an application of the general duty of sincere cooperation, established in article 4.3 TEU, which has been touched upon above. According to the Opinion of Advocate General (AG) Tizzano in the '*open skies'* cases[86] the provisions are to be interpreted as follows: if article 351.1 TFEU is applicable and a Member State fails to comply with the duty of sincere cooperation in good faith, the Member State thereby infringed article 351.2 TFEU.[87]

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[83] See article 351 TFEU.
[84] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 UNTS 331 [cited VCLT].
[85] Case 812/79 *Attorney General v Burgoa*, Judgment of 14 October 1980, EU:C:1980:231, para. 6.
[86] Opinion of Mr Advocate General Tizzano *Conclusion and application by a Member State of a bilateral agreement with the United States of America (the Open Skies cases)*, Opinion of 31 January 2002, EU:C:2002:63.
[87] Ibid, para. 38.

If a BIT is concluded between states where only one of the states has become an EU Member State, the BIT shall remain valid as there is no mutual acceptance of the Treaties replacing any earlier agreements. Nevertheless, BITs containing provisions which are incompatible with EU law can fall within the scope of article 351.2 TFEU whereby the Member State must eliminate the incompatibilities. The determining factor will here be what constitutes an "incompatibility". In several cases this factor has led to confusion and uncertainty whether the obligation under article 351.2 TFEU shall be applied.[88] However, it is clear that the attempt is to promote a common attitude and mutual assistance between the Member States in the matter in order to ensure the full enforcement of the Treaties.[89] In the cases *Commission v Sweden* and *Commission v Austria* the CJEU concluded that Sweden and Austria respectively breached the obligation under article 351.2 TFEU as they did not amend the provisions that were incompatible with EU law.[90] The cases concerned the incompatibilities of investment agreements concluded with third countries, thus extra-EU BITs, as these agreements militated against the application of certain restrictions on the free movement of capital.[91] This extensive application of article 351 TFEU by the CJEU was later revised in the case *Commission v Slovak Republic* where the CJEU went in another direction and concluded that the extra- EU BIT in the case shall remain valid and EU law shall not take precedent as the BIT is protected by article 351.1 TFEU, demonstrating a restrictive approach on declaring extra-EU BITs as incompatible with EU law.[92]

In regard to BITs concluded between European countries, the EU institutions and the Commission long adapted an attitude where BITs were regarded as necessary in order to prepare certain countries for the EU membership,

[88] *Commission v Austria*, para. 41-44; *Commission v Sweden*, para. 42-44; see further C-118/07 *Commission v Finland*, Judgement of 19 November 2009, EU:C:2009:715, para. 38-43.
[89] *Commission v. Sweden*, para. 44.
[90] Ibid, para. 45; *Commission v. Austria*, para. 45.
[91] Ibid, para. 43; *Commission v. Austria*, para. 43.
[92] C-264/09 *Commission v Slovak Republic*, Judgement of 15 September 2011, EU:C:2011:580, para. 51.

whereby the validity of pre-EU membership BITs were not put into question but rather encouraged.[93] However, when both states have entered into the EU, the BIT is classified as an intra-EU BIT and the provision in article 351 TFEU must then be read as a prohibition on the Member States to opt out of EU law based on international agreements. In the case *Commission v Italy* the CJEU determined that in regard to intra-EU BITs, concluded before EU accession, EU law will take precedence. Accordingly, both states have accepted that by entering into the new agreement, the Treaties, it shall replace the rights pursuant to the earlier agreement.[94] The Commission is, in general, of the opinion that intra-EU BITs no longer are necessary because the EU established the single market.[95] The Commission has further submitted several *amicus curiae*[96] opinions where it rejects the validity of intra-EU BITs. It launched infringement proceedings against five Member States in June 2015 in order to have BITs terminated and further initiated consultations with other Member States to have intra-EU BITs terminated. In short, the Commission presented a clear attitude which, in general, entailed an obligation for the Member States to terminate BITs concluded between them.[97]

In contrast to the opinion of the Commission, the international tribunals did not agree that the BITs should be terminated. In the case of *Eastern Sugar*

[93] Demonstrated by e.g. article 72.2 of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part, Brussels, 16 December 1991, OJ L 347, 31.12.1993, pg. 2–266; and article 73.2 of Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, Brussels, 16 December 1991, OJ L 348, 31.12.1993, pg. 2–180; see also Opinion AG Wathelet, *Reference for a preliminary ruling — Bilateral investment treaty concluded in 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic and still applicable between the Kingdom of the Netherlands and the Slovak Republic*, Opinion of 19 September 2017, EU:C:2017:699 [cited Opinion AG Wathelet], para. 40.
[94] Case 10/61 *Commission v Italy*, Judgment of 27 February 1962, EU:C:1962:2, pg. 10-11.
[95] '*Commission Asks Member States to Terminate their Intra-EU Bilateral Investment Treaties*', European Commission Press Release IP/15/5198, 18 June 2015, <http://europa.eu/rapid/press-release_IP-15-5198_en.htm>, accessed 2019-04-04.
[96] See appendix.
[97] '*Commission Asks Member States to Terminate their Intra-EU Bilateral Investment Treaties*', European Commission Press Release IP/15/5198, 18 June 2015, <http://europa.eu/rapid/press-release_IP-15-5198_en.htm>, accessed 2019-04-04; see for further reading Nagy, pg. 988.

B.V v. Czech Republic[98] the issue of jurisdiction arose. The BIT in the case was concluded in 1991 and both parties became members of the EU after the conclusion of the BIT.[99] The Czech Republic argued that the arbitral tribunal lacked jurisdiction over claims that emerged after both parties had acceded to the EU because this changed the relationship between them.[100] As the dispute was decided based on the United Nations Commission in International Trade Law (UNCITRAL) Arbitration Rules[101], the tribunal had to determine its own jurisdiction in regard to the specific dispute.[102] However, the BIT itself did not cover this issue nor did the Accession Treaty[103] and there was no provision stating that the BIT shall terminate when the parties acceded to the EU.[104] Consequently, the arbitral tribunal looked at the VCLT in order to determine the relationship between EU law and the BIT.[105]

Based on the VCLT a treaty can only be terminated pursuant to its own terms or the terms of the VCLT, see article 42. Article 52 VCLT establishes conditions when a treaty shall be terminated, neither of them were however applicable in this case.[106] The tribunal followed three lines of argumentation, all leading to the same conclusion. Firstly, the parties did not intend for EU law to prevail.[107] Secondly, EU law and the BIT did not cover the same subject matter and they did not in itself contain conflicting prerequisites. Thirdly, if there was unequal treatment then the countries and the investors must themselves claim to be treated equally but that does not make the EU law and the BIT incompatible in itself.[108]

[98] *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award of 27 March 2007 [cited *Eastern Sugar]*.
[99] Ibid, para. 3-7.
[100] Ibid, para. 97.
[101] UNCITRAL Arbitration Rules as revised in 2010, General Assembly Resolution 65/22.
[102] *Eastern Sugar*, para. 116-117.
[103] Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia (2003), OJ L 236, 23.9.2003 [cited Accession Treaty].
[104] *Eastern Sugar*, para. 143-154.
[105] Ibid, para. 156.
[106] Ibid, para. 157-158.
[107] Ibid, para. 167.
[108] Ibid, para. 170.

The tribunal thereby concluded that EU law not automatically superseded the BIT in this case solely on the basis of the accession of the parties to the EU.[109] In short, according to the international tribunal there is no obligation to terminate existing BITs according to EU law and it would be contrary to VCLT to require such a termination. Under article 27 VCLT a state cannot invoke its internal law as justification for the failure to perform another treaty. Termination shall only be concluded based on the provisions in the agreement itself or the conditions laid out in the VCLT. Thus, a Member State cannot legally be forced to terminate a BIT, which forms part of public international law, solely based on the existence of EU law.[110]

It is clear from the above-mentioned that the EU and its institutions and the international tribunals did not share the same opinion in the matter. One argued that intra-EU BITs must be terminated while the other urged to maintain the BITs in order to fulfil the obligations under public international law. Consequently, the hope for the CJEU to finally clarify the issue, through the Achmea judgement, was immense.[111]

3.4 The Achmea judgement

3.4.1 Background and facts

The case *Slovak Republic v. Achmea B.V.*[112] is a judgement made by the CJEU based on a request for a preliminary ruling referred to it by the German Federal Court of Justice. The judgement is predicated by a dispute between the Dutch insurance company Achmea D.V. and the Slovak Republic[113], thus a case concerning ISDS. The dispute concerned an arbitral award of 7 December 2012 made by an arbitral tribunal based on the *Agreement on encouragement and reciprocal protection of investments between the*

[109] *Eastern Sugar*, para. 181.
[110] Ibid, para. 95-181.
[111] See *Commission v Italy*, pg. 10-11; compared with *Eastern Sugar*, para. 181.
[112] C- 284/16 *Slowakische Republik v Achmea B.V.*, Judgement of 6 March 2018, EU:C:2018:158.
[113] Cited Slovakia.

Kingdom of the Netherlands and the Czech and Slovak Federative Republic (the BIT).[114] The BIT was concluded in 1991 with the aim to ensure the fair and equitable treatment to the investments of investors of the other contracting party.[115] Slovakia is the successor state to the Czech and Slovak Federative Republic and thus acceded to the provisions established under the BIT.[116] On 1 May 2004 Slovakia acceded to the EU and was thereby bound by EU law as part of that EU membership.[117] Thereafter, Slovakia reformed its health care system opening it up to private insurance companies from Slovakia and other Member States. Achmea is part of an insurance group in the Netherlands which set up a subsidiary in Slovakia after the previously mentioned reform of the health care system. In 2006 Slovakia reversed parts of the reform and prohibited the distribution of profits generated by private sickness insurance activities. This was yet again reversed in 2011 as it did not comply with the Slovak constitution.[118]

Achmea was of the impression that these measures caused the company damage and initiated proceedings pursuant to clause 8 in the BIT, containing the ISDS mechanism outlining the option of investor-state dispute settlement and arbitration. The decision made by the tribunal shall according to article 8 of the BIT be final and binding upon the parties in the dispute.[119] In these proceedings Germany was chosen as the place of arbitration and German law as the applicable law.[120] Slovakia raised the question of jurisdiction, implying that the ISDS clause in article 8 of the BIT is incompatible with EU law.[121] Nevertheless, the arbitral tribunal dismissed the objection and obliged Slovakia to pay damages. In dissatisfaction Slovakia brought an action before the German national courts in order to set aside the arbitral award. The case was passed through all levels of appeal, up to the German Federal Court of Justice which referred the case to the CJEU requesting a preliminary ruling

[114] *Achmea judgement*, para. 2.
[115] Ibid, para. 3.
[116] Ibid, para. 6.
[117] Article 1-2 of the Accession Treaty.
[118] *Achmea judgement*, para. 7-8.
[119] Ibid, para. 4.
[120] Ibid, para. 10.
[121] Ibid, para. 11.

pursuant to article 267 TFEU.[122] The referring court in short asked if the arbitration clause is compatible with EU law, specifically article 18, 267 and 344 TFEU.[123] The German Federal Court of Justice made it clear in its reference that it did not consider intra-EU BITs to be incompatible with EU law.[124] This opinion was shared with AG Wathelet, however in the end his opinion was rejected by the CJEU.[125]

3.4.2 The CJEU's line of argumentation

With reference to the presented opinion above of the German Federal Court of Justice, and the Opinion of AG Wathelet, the expectation would be for the CJEU to rule closely in line with those opinions. The CJEU, however, chose a different path. Firstly, the CJEU focused on the nature of the EU legal system as it is based on the autonomy from the nation legal systems of the Member States and the international legal system, including international agreements. Thus, the BIT cannot affect the allocation of competences pursuant to the Treaties.[126] The CJEU further highlighted that the principle of the autonomy of the EU legal system is particularly ensured through the exclusive jurisdiction of the CJEU regarding dispute settlement pursuant to article 344 TFEU. *Opinion 2/13*[127] regarding the accession of the EU to the ECHR is of particular importance as it demonstrates that the accession to the ECHR, which should be concluded as set out in article 6 TEU, is incompatible with article 344 TFEU as the possibility of submitting a claim to the European Court of Human Rights (ECtHR) remained and therefore could be liable to breach the CJEU's exclusive jurisdiction within the scope of EU law as issues of EU law could be determined by the ECtHR.[128] Furthermore, article 344

[122] *Achmea judgement*, para. 12.
[123] Ibid, para. 23.
[124] WM 2018, 2294, BGH, Beschluss vom 31.10.2018 - I ZB 2/15, "*Gleichstehen des Fehlens einer Schiedsvereinbarung mit ihrer Ungültigkeit*".
[125] Opinion AG Wathelet, *Reference for a preliminary ruling — Bilateral investment treaty concluded in 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic and still applicable between the Kingdom of the Netherlands and the Slovak Republic*, Opinion of 19 September 2017, EU:C:2017:699, para. 228.
[126] *Achmea judgement*, para. 32.
[127] Opinion 2/13 *Accession of the European Union to the ECHR*, Opinion of 18 December 2014, EU:C:2014:2454 [cited Opinion 2/13].
[128] Ibid, para. 212.

TFEU must be interpreted as outlining the very nature of the exclusive jurisdiction of the CJEU demonstrating the prohibition of any control by another body within that sphere.[129]

Furthermore, the CJEU justified the autonomy of the EU as it is necessary based on the constitutional structure of the EU and the nature of the law. EU law stems from its own independent source with its own principles and the enforcement thereof shall focus on the goals and values of the EU. [130] The enforcement of EU law in its entirety within all Member States is further ensured through the duty of sincere cooperation as well as the established judicial system based on the national courts, tribunals and the CJEU.[131] The preliminary ruling system under article 267 TFEU which has been utilised in this case, is an important factor and tool in this judicial system, in order to achieve the objectives of the EU, as laid out above.[132]

In regard to the jurisdictional issue the CJEU first highlighted that the EU law forms part of the national legal system of the Member States and itself must be regarded as deriving from an international agreement between the Member States.[133] Therefore, the arbitral tribunal may interpret or apply EU law in its proceedings based on the competence conferred upon it in article 8 of the BIT, as it shall take into account the law in force of the contracting parties as well as other relevant agreements between the contracting parties.[134] In order for this to comply with EU law the tribunal must be regarded as a "court or tribunal" in accordance with article 267 TFEU, otherwise the tribunal would rule on a matter falling within the exclusive competence of the CJEU as the matter is within the scope of EU law. A tribunal that fulfils the conditions in order to fall within the definition of a court or tribunal in article 267 TFEU

[129] Opinion 2/13, para. 210.
[130] *Achmea judgement*, para. 33.
[131] Ibid, para. 34-36.
[132] Ibid, para. 37.
[133] Ibid, para. 41.
[134] Ibid, para. 42.

will be situated within the EU legal system and it could thereby be ensured that EU law will be fully enforced.[135]

The specific arbitral tribunal in Achmea did however not fulfil the conditions in order to fall within the EU definition of a court or tribunal on the following reasons: it is not a court common to a number of Member States, the arbitral tribunals jurisdiction is of an exceptional nature and is not part of the jurisdiction of any of the contracting parties, and thus it cannot make a reference for a preliminary ruling.[136] Additionally, an arbitral award rendered on the basis of article 8 of the BIT is not subject to effective review by a Member State court.[137] In general the review of arbitral awards is limited, nevertheless, the tribunal is able to select its seat and could thereby flee from the EU if it would choose a seat outside of the EU. Consequently, no Member State would have the power to review the award, even if it otherwise would be able to do so under the annulment procedure, as the dispute has been removed from the jurisdiction of the Member State.[138] Considering the finality of the arbitral tribunals decision pursuant to article 8 in the BIT, the Member States established a situation where disputes between Member States and investors would be settled without the full enforcement and effectiveness of EU law.[139] The preliminary ruling system under article 267 TFEU has thereby been undermined which is incompatible with the principle of sincere cooperation as the effectiveness of EU law and jurisdiction of the EU is at risk.[140]

In short, the CJEU ruled that article 267 and 344 TFEU preclude ISDS provisions in international agreements concluded between Member States, such as article 8 of the BIT in question.[141] This was based on the prerequisite that parts of the BIT overlaps with EU law, specifically the provisions on the

[135] *Achmea judgement*, para. 44.
[136] Ibid, para. 45 and 48-49.
[137] Ibid, para. 53.
[138] Ibid, para. 52.
[139] Ibid, para. 51, 56.
[140] Ibid, para. 58.
[141] Ibid, para. 60.

free movement of capital and the freedom of establishment. Through this overlap it falls within the scope of EU law and the jurisdiction would infringe the exclusive jurisdiction of the CJEU.[142]

3.4.3 Practical impact of Achmea

Achmea is certainly an attempt by the CJEU to answer the questions regarding intra-EU BITs and ISDS clauses contained therein. Based on the CJEU's reasoning the case would disallow the application of EU law by any judicial body outside of the European judicial hierarchy, but also the application of any rules other than those of EU law in those areas covered by EU law. This extensive interpretation does not only affect the legality of intra-EU BITs but also the compatibility of investment chapters in EU Agreements or any other intra-EU agreement containing such clauses.[143]

However, Achmea does not put an end to the controversy on intra-EU BITs, the CJEU solely focused on the dispute settlement clauses whereas the substantive provisions of BITs remain intact.[144] This case was peculiar as it was one of the few cases where the investor's claim concerned the BITs free movement provisions instead of its investment protection rules, and thus it automatically fell within the scope of EU law as it overlapped with the EU's internal market regime regarding the free movement of capital and freedom of establishment.[145] Both BITs and EU law contain provisions on the free movement of capital and freedom of establishment but these provisions are rarely arbitrated, whilst the provisions in the BIT on the investment protection rules such as expropriation, fair and equitable treatment are the basis of the majority of investment claims.[146] In EU law there are no corresponding

[142] *Achmea judgement*, para. 40-42.
[143] See for discussion: 'From conflicts-rules to field-preemption: Achmea and the relationship between EU law and international investment law and arbitration', European Law Blog, Herm Schepel, 23 March 2018, <http://europeanlawblog.eu/2018/03/23/from-conflicts-rules-to-field-preemption-achmea-and-the-relationship-between-eu-law-and-international-investment-law-and-arbitration/#_edn1,>, accessed 2019-03-08.
[144] Nagy, pg. 993.
[145] Ibid, pg. 989.
[146] Ibid, pg. 993.

provisions on investment protection and thus the overlap between EU law and BITs is in general slight, which the CJEU itself confirmed in its Achmea ruling.[147] Consequently, the CJEU addressed one of the very rare cases where the arbitrated provisions overlap with EU law, while the scope of this binding authority is not settled in EU law.[148] This demonstrates that the issue of intra-EU BITs and the compatibility of them with EU law is not finally settled as there remain areas that are not directly affected by the Achmea judgement.[149]

The next section of this thesis will focus on this presented complexity, the extent of the applicability of the Achmea judgement on other treaties containing the corresponding ISDS clause, however, focusing on a multilateral treaty signed by the Member States and the EU individually.[150]

[147] *Achmea judgement*, para. 42.
[148] Nagy, pg. 995.
[149] Ibid, pg. 996.
[150] See section 4.

4 ISDS clauses in multilateral treaties

It has already been presented that the Achmea judgement entails the incompatibility of ISDS clauses in intra-EU BITs with EU law. The research question on the applicability of the Achmea judgement on multilateral treaties, where the EU itself is a contracting party, requires a presentation of the external competence of the EU and the allotment of competences between the Member States and the EU. This will demonstrate the existence of mixed agreements, which will be exemplified by the ECT and the ISDS clause contained therein. As the main research question concerns the applicability of the Achmea judgement on multilateral treaties, this section will further present the explicit opinions of the EU institutions and the international tribunals on the extent of the applicability.

4.1 Brief background on EU international relations law

The EU has over time through case-law developed the law that now governs the EU's external competence. This was required as the powers expressly laid out in the Treaties concerning the external relations of the EU are limited.[151] Nevertheless, in the light of the principle of conferral it is important to highlight that the Member States expressly have provided the EU with competences in external relations. Article 3.5 TEU highlights the importance of maintaining and promoting the EU values and interests even in the external area as well as the importance of observing international law. Further, article 205 TFEU, which is applicable on external relations other than the Common Foreign and Security Policy, is a reminder that the EU's external action shall be based on the objectives and general provisions of the EU. These provisions

[151] Craig & De Búrca, pg. 316.

shall contribute to the establishment of a framework of common principles and objectives for international relations of the EU. This is further set out in article 21 TEU, outlining that the EU shall pursue common policies and actions and aspire a high degree of cooperation in all areas of international relations in order to achieve the objectives laid out in this article 21 TEU.[152]

It is clear that the ambition is to participate in the international arena as an individual actor. The possibility of doing so arises through the legal personality that is established in article 47 TEU. This legal personality is further defined in article 335 TFEU providing each EU institution with the legal capacity in matters relating to their respective operations. How this shall be interpreted and applied has been highly debated over the years. The consensus seems to be that the EU has international legal personality whereby the EU has the capacity to act within the international arena including the right to conclude treaties in areas where legal authority can be found in a specific conferral of power, which is in line with the principles and objectives of the EU in general.[153]

4.2 Conclusion of international agreements by the EU

As mentioned above the EU has the legal capacity to enter into international agreements. The Treaties state a general procedure for the exercise of those treaty-making powers in article 218 TFEU. As laid out in the section on the principle of conferral above, the competence conferred on the EU can be shared or exclusive, which also is applicable on the external competence. The allocation of competences regarding external relations generates the existence of mixed agreements, which are international agreements entered into by both the Member States individually as well as the EU. Mixed agreements are possible based on the competence being shared in those areas of the international agreement in question or if the agreement touches upon various

[152] See article 3.5 and 21 TEU and 205 TFEU.
[153] Craig & De Búrca, pg. 322.

areas and the agreement is not covered by exclusivity in its entirety. Shared competence in the Treaties is based on the scope of the specific provision which empowers the EU institutions to act.[154] When determining the legal basis of the competence, the predominant purpose of the EU measure will determine which provision will have to be regarded as conferring the competence on the EU.[155] The allocation of competences is governed solely by the Treaties, thus internal rules of law cannot alter that allocation.[156] As long as both the EU and the Member States obtain the capacity to enter into international agreements mixed agreements must be considered and the effect of them evaluated.[157]

If the agreement has been entered into by the Member States individually, they will be legally bound by the obligations in the agreement as they are acting with their own competence. If, however, the EU acts as an individual actor in the international legal area this will also affect the obligations of the Member States. Agreements concluded by the EU will be binding on the EU institutions and the Member States pursuant to article 216.2 TFEU. In the case of *Haegeman*[158] the CJEU determined that an agreement will form part of EU law as soon as it enters into force.[159] As the agreement then will form an integral part of EU law the Member States will automatically be bound by it, as the EU has the competence to act on their behalf.[160]

This is of particular importance when researching the argumentation of the EU and the international tribunals in regard to the compatibility of ISDS clauses contained in an agreement concluded by the EU and the Member

[154] Opinion 1/08 *Agreements modifying the Schedules of Specific Commitments under the GATS*, Opinion of 30 November 2009, EU:C:2009:739, para. 112.
[155] See C-281/01 *Commission v Council*, Judgment of 12 December 2002, EU:C:2002:761, para. 43; and C-137/12 *Commission v Council*, Judgement of 22 October 2013, EU:C:2013:675, para. 76.
[156] Opinion 1/94 *Agreements annexed to the WTO Agreement*, Opinion of 15 November 1994, EU:C:1994:384, para. 20.
[157] Craig & De Búrca, pg. 352.
[158] Case 181/73 *R. & V. Haegeman v Belgian State*, Judgement of 30 April 1974, EU:C:1974:41.
[159] Ibid, para. 5.
[160] Craig & De Búrca, pg. 352.

States as individual actors. It is evident that the Member States will be legally bound by the actions of the EU even in the area of international relations.[161]

4.3 Competence on ISDS

The Commission has over the years stated that it regards the competence on dispute settlement as being exclusive for the EU. There are several opinions, such as Opinion 1/91, 1/09[162] and 2/13, putting forward that if the EU has competence as regards the substantive provisions of an international agreement, it also has competence in connection to the dispute settlement mechanism which are provided for in that agreement in order to ensure that the obligations in the agreement are enforced effectively.[163] The CJEU has been persistent on ensuring the autonomy of the EU legal system even when the EU has entered into an agreement which may contain provisions where the powers conflict with those of the EU institutions.[164] This is specifically exemplary in Opinion 1/76[165] where the CJEU rejected establishing a special tribunal and Opinion 1/91 on the EEA Agreement where the CJEU rejected establishing a special EEA Court as it would be incompatible with EU law.[166]

Furthermore, there are several international agreements containing ISDS clauses referring to the ICSID. The EU itself cannot be a party to the ICSID Convention[167] as only States can be a party thereto, see article 67 of the ICSID Convention. It therefore seems unconventional for the EU to enter into an international agreement and agreeing to a dispute settlement mechanism based on a Convention to which it cannot accede to. Nevertheless, the CJEU has held that an obstacle under international law preventing the EU from

[161] See article 216.2 TFEU on the binding nature of international agreements entered into by the EU.
[162] Opinion 1/09 *Agreement creating a Unified Patent Litigation System*, Opinion of 8 March 2011, EU:C:2011:123 [cited Opinion 1/09].
[163] See Opinions 1/91, para. 40 and 70; Opinion 1/09, para. 74; and Opinion 2/13, para. 182.
[164] Craig & De Búrca, pg. 356.
[165] Opinion 1/76 *Draft Agreement establishing a European laying-up fund for inland waterway vessels*, Opinion of 26 April 1977, EU:C:1977:63.
[166] Ibid, para. 45; see also Opinion 1/91, para. 210.
[167] ICSID Convention, Regulations and Rules, International Centre for Settlement of Investment Disputes, Washington D.C, ICSID/15, April 2006 [cited ICSID Convention].

becoming a party to an international agreement does not affect the allocation of competences between the EU and the Member States, as the external competence of the EU only shall be based on EU law itself.[168] When there is such a restriction where the EU cannot act on its own then the EU can act through its Member States as they act in the interest of the EU and thereby exercise its external competence.[169]

The external competence of the EU and of the CJEU was further examined in *Opinion 2/15*[170] regarding the EU-Singapore Free Trade Agreement (FTA) where it was concluded that the investment provisions in the FTA covered more than FDI because the investment protection was not directly linked to international law and therefore fell outside of the exclusive competence of the EU in the common commercial policy area.[171] It can be deemed that this should be enough to refuse the CJEU exclusive jurisdiction in the matter. However, the CJEU has already ruled that the competence of the EU to enter into international agreements includes the competence to combine those commitments with institutional provisions. The existence of such commitments does not affect the competence of the EU to conclude the international agreement itself.[172] The ISDS clause requires Member State's consent regardless of whether the substance of investment protection falls within shared or exclusive competences. Consequently, the fact that the agreement was not within the exclusive competence of the EU did not affect the validity of the ISDS clause. In the opinion it was argued that these provisions remove disputes from the jurisdiction of the Member States as the consent of the Member States in regard to investment arbitration must have been deemed to have been submitted through signing the agreement itself.[173]

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[168] Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore*, Opinion of 16 May 2017, EU:C:2017:376 [cited Opinion 2/15], para. 28.
[169] See Opinion 2/91 *ILO Convention No 170*, Opinion of 19 March 1993, EU:C:1993:106, para. 3 - 5. In that case, the ILO Constitution precluded the European Community from concluding Convention No 170.
[170] Opinion 2/15 *Free Trade Agreement between the European Union and the Republic of Singapore*, Opinion of 16 May 2017, EU:C:2017:376.
[171] Ibid, para. 27.
[172] Ibid, para. 276.
[173] Ibid, para. 291-292.

What this is supposed to mean was later made clear in the Achmea judgement as the CJEU had the opportunity to address issues of compatibility with EU law of investment arbitration. The CJEU determined that it is incompatible with the principle of autonomy of EU law for Member States to remove disputes which may concern the application or interpretation of EU law from the jurisdiction of their national courts and thereby from the system of judicial remedies pursuant to article 19 TEU.[174] This was however in regard to intra-EU BITs and the application thereof on multilateral treaties has yet not been settled. Opinion 2/15 concerns an extra-EU agreement while the Achmea judgment concerns an intra-EU BIT. Although the role of these agreement differs within the EU legal order, the CJEU seems to come to the same conclusion regarding ISDS clauses.[175] The purpose of this thesis is to further analyse whether the same outcome is to be expected regarding the ECT, which will be researched in the next section.[176]

4.4 Background on the ECT and its ISDS clause

The EU has in the Achmea judgement determined that ISDS clauses in intra-EU BITs are incompatible with EU law and the Commission has held that this shall apply to multilateral treaties as well. In order to research this issue further the ECT is used as an example of a multilateral treaty signed by the Member States individually as well as the EU, containing an ISDS clause similar to the one declared incompatible in the Achmea judgement.

The ECT was based on the previous political declaration, the *European Energy Charter*[177] adopted on 17 December 1991.[178] The contracting parties to the ECT include 27 EU Member States, as well as other countries such as

[174] *Achmea judgement*, para. 55.
[175] See section 3.4.2. on the line of argumentation in the Achmea judgement.
[176] See section 4.4.
[177] European Energy Charter, adopted by the Hague Conference on the European Energy Charter, The Hague,17 December 1991.
[178] Preamble of the ECT.

Norway and Switzerland. Additionally, Euratom and the EU are contracting parties of the ECT.[179] The purpose of the ECT is laid out in its article 2 stating that it establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits.[180] The ECT has significant legal effects on commercial energy relations, specifically investments and trade between Member States.[181]

The ECT further contains mechanisms for dispute resolutions, which are based on international arbitration, both for investor-state disputes and inter-state disputes.[182]Article 26 concerns the settlement of disputes between an investor and a contracting party, stating that disputes shall be settled amicably whereas if this is not possible the investor party to the dispute may choose to submit it for resolution to the courts or administrative tribunals of the concerning contracting party, any other previously agreed dispute settlement procedure or the international arbitration or conciliation as follows in the article. Further, the options are laid out to be the ICSID, a sole arbitrator or ad hoc arbitration tribunal established under UNCITRAL, or an arbitral proceeding under SCC.[183] The dispute settlement mechanism in the ECT has been widely used for investor-state disputes, however rarely in regard to inter-state disputes.[184]

[179] 'The Energy Charter Treaty', 18 February 2019, <https://energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/>, accessed 2019-02-20.
[180] Article 2 ECT.
[181] 'Energy Charter – A multilateral process for managing commercial energy relations', European Parliamentary Research Service, Alex Benjamin Wilson, July 2017, PE 607.297, <http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607297/EPRS_IDA(2017)607297_EN.pdf >, accessed 2019-04-12, pg. 1.
[182] See article 26 and article 27 ECT.
[183] See article 26.4 ECT.
[184] 'Energy Charter – A multilateral process for managing commercial energy relations', European Parliamentary Research Service, Alex Benjamin Wilson, July 2017, PE 607.297, <http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/607297/EPRS_IDA(2017)607297_EN.pdf >, accessed 2019-04-12, pg. 1.

4.5 EU rejects ECT as a basis for intra-EU ISDS

On 19 July 2018 the European Commission[185] published a communication to the European Parliament and Council of the EU where the EU highlighted its position that intra-EU ISDS clauses are incompatible with EU law, pointing out its Achmea judgment where the ISDS clause was found as incompatible with EU law.[186] According to the Commission, the ISDS clause in the ECT is not applicable between Member States as the primacy of EU law states that the provision is incompatible with EU primary law and therefore shall not be applied.[187] It is laid out that the Achmea principle shall be applied to any clause allowing the possibility of submitting those intra-EU investor-state disputes to a body which is not part of the EU judicial system. Further, the Commission stated that the circumstance that the EU itself is a contracting party to the ECT does not amend this conclusion as the participation of the EU in the ECT only created rights between the EU and third states but not between the Member States.[188] Consequently, the Commission is of the opinion that Achmea shall be applied *mutatis mutandis*[189] to mixed agreements to which both the EU Member States and the EU are contracting parties.[190]

4.6 ICSID cases on the applicability of Achmea on the ECT

It is evident from the abovementioned communication that the EU and its institutions consider the Achmea judgement as being applicable on all intra-

[185] Cited Commission.
[186] European Commission, 'Communication from the Commission to the European Parliament and the Council Protection of intra-EU Investment', (Communication), Brussels 19 July 2018, COM(2018) 547 final [cited Commission Communication], pg. 3-4.
[187] Ibid, pg. 4.
[188] Ibid.
[189] See appendix.
[190] Commission Communication, pg. 4.

EU ISDS clauses in all international agreements regardless of the bilateral or multilateral nature. Nevertheless, international tribunals have submitted cases where this conclusion of the EU has been questioned and criticised.[191] In regard to the authoritative nature of arbitral awards the *1958 New York Convention*[192] contains provisions and obligations regarding the recognition and enforcement of such arbitral awards and only states a short list of grounds for refusal.[193] Furthermore, as an example, the *1965 Washington Convention*[194] makes the enforcement of ICSID awards mandatory without stating any options of refusal. As stated in article 53.1 of the ICSID Convention the awards are binding on all parties of the proceedings and can be enforced in a contracting state as if it were a final judgment by the national courts of that contracting state as establishing in article 54.1 of the ICSID Convention. Based on these provisions in article 53 and 54 of the ICSID Convention, awards are excluded from any review unless they are subject to appeal or public policy review. These restrictions and limitations demonstrate that arbitral awards may have a bearing on and be enforced in a Member State, therefore providing a line of argumentation which may be used in order to understand the complexity of the legal status of ISDS clauses in intra-EU situations.[195]

Prior to the Achmea judgement, international tribunals had already ruled that they do not share the opinion of the Commission. In *Charanne v. Spain*[196],

[191] See *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award of 16 May 2018 [cited *Masdar Solar*]; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.á.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award 4 May 2017 [cited *Eiser v. Spain*]; *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award of 9 October 2018 [cited *UP and CD case*]; and *Vattenfall AB and others v. Federal Republic of Germany* – ICSID Case No. ARB/12/12, Decision on the Achmea issue of 31 August 2018 [cited *Vattenfall decision*].

[192] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, 330 UNTS. 38 [cited 1958 New York Convention].

[193] Articles III – V of the 1958 New York Convention.

[194] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, ICSID, Washington 1965, 575 UNTS 159.

[195] See article 53-54 of the ICSID Convention on the limitations and restriction on the refusal of enforcement and validity of arbitral awards.

[196] *Charanne B.V. and Construction Investments S.á.r.l v. Kingdom of Spain*, SCC Case No. V 062/2012, Award of 21 January 2016 [cited *Charanne v. Spain*].

Eiser v. Spain[197], *Isolux Netherlands BV v. Kingdom of Spain*[198] and *Blusun v. Italy*[199] the international tribunals all rejected the submissions by the Member States, including the amicus curiae briefs submitted by the Commission, that the tribunal lacked jurisdiction in regard to claims between an investor from an EU country and a Member State.[200] One important case which is repeatedly mentioned in these rulings is *Eco Swiss*[201], concerning the arbitrability of EU competition law. The CJEU ruled in *Eco Swiss* that the EU competition law forms part of public policy as stated in article V(2)(b) of the New York Convention.[202] Thereby it enforces an obligation on Member States and their national courts to perform a substantive review of international commercial arbitration awards in order to ensure that these awards comply with EU competition law. With that statement the CJEU endorsed that issues of EU competition law may be submitted to arbitration.[203] Additionally, the Commission has declared its support for the arbitrability within the context of EU merger control. This is supported by the Commission as it established a special regime where it can intervene as amicus curiae, as expressly cited in the Commission's policy guidance.[204]

It is thus not surprising that international tribunals argue that investment arbitration based on intra-EU ISDS clauses should be accepted. This perspective has been confirmed in regard to the ECT in the case *Electrabel v. Hungary*[205] where the tribunal considered it relevant that the EU signed the

[197] *Eiser Infrastructure Limited and Energía Solar Luxembourg S.á.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award 4 May 2017 [cited *Eiser v. Spain*].
[198] *Isolux Netherlands BV v. Kingdom of Spain,* SCC Case V2013/153, Award of 17 July 2016 [cited *Isolux v. Spain*].
[199] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic,* ICSID Case No. ARB/14/3, Award of 27 December 2016 [cited *Blusun v. Italy*].
[200] *Charanne v. Spain,* para. 450; *Eiser v. Spain*, para. 186; *Isolux v. Spain*, para. 655; and *Blusun v. Italy*, para. 309.
[201] C-126/97, *Eco Swiss China Time Ltd v Benetton International NV,* Judgement of 1 June 1999, EU:C:1999:269 [cited *Eco Swiss*].
[202] Ibid, para. 39.
[203] Ibid, para 40.
[204] European Commission, '*Commission Notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No 802/2004'*, (Notice), 2008/C 267/01, para. 66 and 130.
[205] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award of 25 November 2015 [cited *Electrabel v. Hungary*].

ECT, thereby accepting the ISDS clause in article 26 ECT.[206] Nevertheless, it must be kept in mind that the ECT does not allow reservations.[207] The tribunal concluded that there is no material inconsistency between EU law and the ECT and that article 26 ECT is not invalidated, suspended or terminated pursuant to international law.[208] Consequently, the jurisdiction of the tribunal in intra-EU investor state arbitration will, according to this case, not be affected by EU law.[209]

The international tribunals have remained on that path even after the Achmea judgement and the basis of argumentation can best be represented by the following case-law.

4.6.1 Masdar Solar v. Spain

The *Masdar Solar* case[210] case concerns a dispute submitted to the ICSID on the basis of the ECT and the ICSID Convention.[211] Masdar Solar & Wind Cooperatief U.A., a private limited liability company incorporated under the laws of the Netherlands, brought claims against Spain as it considered that their investments were affected by measures implemented by Spain regarding modifications of the regime of general renewable energy projects and particularly solar thermal power installations thereby causing damages to the company.[212]

Spain raised an objection in the case regarding the application of article 26 of the ECT arguing that the article shall not be applicable to intra-EU disputes.[213] Spain thus claimed that the arbitral tribunal lacks jurisdiction over an intra-EU investor-state dispute under the ECT relating to rights of an EU investor

[206] *Electrabel v. Hungary*, para. 4.158.
[207] See article 46 ECT.
[208] *Electrabel v. Hungary*, para. 4.194-4.196.
[209] Ibid, para. 4.199.
[210] *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award of 16 May 2018 [cited *Masdar Solar*].
[211] *Masdar Solar*, para. 1.
[212] Ibid, para. 5.
[213] Ibid, para. 296.

in the internal electricity market of the EU.[214] The Commission submitted an amicus curiae opinion, agreeing with Spain that the tribunal lacked jurisdiction in the matter. The Commission is under the impression that the goal of the ECT was not to confer the right to an EU investor to rely on ISDS against a Member State. Furthermore the Commission stated that it would violate EU law, as the ECT cannot create new rights and obligations for EU investors and Member States, based on the fact that EU law already contains a complete set of rules in the area of energy investments EU nationals when investing in another Member State than their own.[215]

The tribunals argumentation in the case started with the analysis of the language of article 26 ECT, concluding that it in itself does not exclude intra-EU disputes from its scope.[216] In short, the tribunal stated that the ISDS provision contained in the ECT must be applied in compliance with its scope, which includes the international arbitration under the ICSID Convention, based on the understanding that solely the ECT deals with investor-State arbitration.[217] EU law may preclude intra-State arbitration within the EU but not disputes between private parties or investor-state disputes.[218]

Spain thereafter submitted an application requesting the tribunal to reopen the arbitral procedure based on the Achmea judgement.[219] Spain maintained that the tribunal should interpret the ECT in line with EU law and conclude that an EU investor is unable to bring an investment arbitration proceeding against an Member State.[220] The tribunal, however, concluded that the Achmea judgement does not change the outcome of the case as it does not have any bearing on the case. Further explaining that the Achmea judgement solely is applicable on bilateral investment treaties and does not consider multilateral

[214] *Masdar Solar*, para. 297.
[215] Ibid, para. 304-305.
[216] Ibid, para. 313.
[217] Ibid, para. 340.
[218] Ibid, para. 337; see also *Electrabel v. Hungary*, para. 444-445.
[219] *Masdar Solar*, para. 669.
[220] Ibid, para. 674.

treaties such as the ECT, where the EU itself is a party.[221] The tribunal elaborated that this is in line with the Opinion of AG Wathelet the in Achmea judgement as AG Wathelet stated that the case was the first opportunity for the CJEU to express its views on the compatibility of BITs between Member States and the ISDS system used in those BITs.[222] The tribunal stated the following, "*the Achmea judgement is simply silent on the subject of the ECT*"[223], finally concluding that the Achmea judgement shall not be applied in the case regarding the ECT as it presents distinct factors from a bilateral investment treaty.[224]

4.6.2 Vattenfall v. Germany

The *Masdar Solar* case highlights the position of international tribunals in the applicability of the Achmea judgement on multilateral treaties such as the ECT. Another important case outlining the standpoint of international tribunals is *Vattenfall v. Germany*[225]. The decision arose through the jurisdictional objection made by Germany stating that all claims pending before the tribunal should be dismissed as the tribunal lacks jurisdiction in the light of the Achmea judgement.[226] The tribunal was of the opinion that the Achmea issue must be dealt with separately and therefore issued a separate decision regarding this topic.[227]

In order to determine the jurisdiction of the tribunal and whether the Achmea judgement prohibits this jurisdiction, the tribunal started by looking at the source of its own jurisdiction. This includes determining the applicable law in regard to the jurisdictional question and not the actual dispute in the case.[228]

[221] *Masdar Solar*, para. 678-679.
[222] Opinion AG Wathelet, para. 2.
[223] *Masdar Solar*, para. 682.
[224] Ibid, para. 681-683.
[225] *Vattenfall AB and others v. Germany*, ICSID Case No. ARB/12/12 Decision on the Achmea issue of 31 August 2018 [cited *Vattenfall decision*].
[226] Ibid, para. 1.
[227] Ibid, para. 3.
[228] Ibid, para. 108–110.

Firstly, the tribunal was required to determine whether EU law is applicable, which includes the judgement of the CJEU in Achmea. The tribunal considered whether EU law and thus the Achmea judgement is applicable in connection to the language of article 26 ECT, which states that disputes shall be determined in accordance to the provisions of the ECT, as well as relevant rules and principles in international law.[229] The tribunal concluded on this matter that article 26 when referring to "disputes" or "issue in dispute" does not include questions regarding the tribunals jurisdiction.[230] Continuing, the tribunal based its competence on the fact that the parties agreed to arbitrate pursuant to the ECT. As there is no choice of law clause that determines which law shall apply to the jurisdictional question, the tribunal decides this question must be answered in the light of article 26 ECT. This means that since it is an international agreement it must be interpreted in the light of international law. Interpretation and application of treaties is in international law regulated in the VCLT.[231] The interpretation must further be based on the ICSID Convention as the parties decided to arbitrate a dispute under the ICSID Convention pursuant to article 26.4(a)(i) ECT.[232]

Germany as the respondent in this case argued that since the dispute involved legal relationships between two Member States, then the principle of primacy of EU law must be applied even in the application of article 26 ECT.[233] In connection thereto, the European Commission argued that EU law can be applicable based on article 31.3(c) VCLT as "relevant rules of international law applicable in the relations between the parties".[234] Consequently, the tribunal analysed whether EU law is part of international law.[235] Thereby referring to article 38 of the *Statute of the International Court of Justice*[236],

[229] *Vattenfall decision,* para. 112–114.
[230] Ibid, para. 121.
[231] Ibid, para. 124–125.
[232] Ibid, para. 126–127.
[233] Ibid, para. 130.
[234] Ibid, para. 133–134.
[235] Ibid, para. 134–135.
[236] Statute of the International Court of Justice, United Nations, 18 April 1946, 33 UNTS 993.

outlining the relevant sources in international law.[237] The tribunal concluded that it is undisputed in the case that the Treaties are international agreements between the Member States and the EU.[238] In regard to specifically investment arbitration, EU law has been viewed as international law since the decision in *Electrabel v. Hungary*.[239] The tribunal further outlined that the CJEU has the competence to give preliminary rulings regarding the interpretation of the Treaties, pursuant to article 267 TFEU, and thus the judgements by the CJEU must also form part of international law.[240] While the tribunal agreed that EU law is international law, it objected that it is general law that is applied for the interpretation of other treaties under international law. Thus, it cannot be used in order to interpret the ECT.[241] Consequently, the tribunal simply determined that an interpretation where the Achmea judgement precludes intra-EU disputes to be arbitrated under article 26 ECT goes out of the ordinary meaning of the terms laid out in the article and cannot be based solely on the fact that EU law is part of international law.[242] In short, the tribunal confirmed that EU law and judgments by the CJEU form part of international law but not such general law which shall be applied for the interpretation and application of clauses of other international agreements.[243] As the Achmea judgement refers to BITs and is silent on the matter of multilateral treaties, such as the ECT, which in contrast AG Wathelet specifically referred to, the tribunal concluded that the principle cannot simply be applied further than its specific area of application as established in the case.[244]

[237] *Vattenfall decision*, para. 140.
[238] Ibid, para. 142.
[239] Ibid, para. 146.
[240] Ibid, para. 148.
[241] Ibid, para. 133.
[242] Ibid, para. 166–167.
[243] Ibid, para. 133.
[244] Ibid, para. 167; Opinion AG Wathelet, para. 43.

4.6.3 UP and C.D Holding Internationale v. Hungary

Another case concerning the jurisdiction and applicability of Achmea is *UP and C.D Holding Internationale v. Hungary*[245] The tribunal highlighted that Achmea led to heated debates and discussions both in jurisprudence and academic writing. The tribunal decided that there is no need for a detailed discussion on the Achmea judgement, it merely outlined that the jurisdiction of the tribunal must be decided based on the ICSID Convention, which is set in a public international law context rather than a national or regional context.[246] Further, the Achmea judgement was based on certain factors which did not align with the factors in the present case before the ICSID.[247] Outlining the differences the tribunal pointed out that Achmea was not connected to the ICSID Convention as such and did not render obligations under the ICSID Convention as incompatible with EU law.[248] The tribunal thereby concluded that its jurisdiction shall not be affected by the Achmea judgment as the factors differ significantly and the Achmea judgement focused on aspects inapplicable in this case.[249] The tribunal further determined that Hungary in this case did not explicitly remove itself as a contracting party to the ICSID Convention through the EU membership, thereby Hungary has not withdrawn its consent to arbitration under the ICSID Convention.[250]

4.7 Further requests for the CJEU to rule on the compatibility of ISDS clauses

Based on the differing opinions of the international tribunals and the EU and its institutions there have been cases where a party in the arbitration proceedings asked Member States to request a preliminary ruling under article

[245] UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary, ICSID Case No. ARB/13/35, Award of 9 October 2018 [cited *UP and CD case*].
[246] Ibid, para. 252-253.
[247] Ibid, para. 254-255.
[248] Ibid, para. 256-263.
[249] Ibid, para. 266.
[250] Ibid, para. 264.

267 TFEU, in order to determine whether the Achmea judgement is applicable on the ISDS clause in the ECT.[251]

In *Novenergia v. Spain*[252] the SCC had to decide whether the tribunal has jurisdiction in the matter, while Spain objected to the jurisdiction with support from the Commission and its amicus curiae brief of 2 May 2017.[253] Spain argued based on the brief that an investor cannot be an investor of another contracting party as defined in article 26 ECT, as the investor and the state both are part of the EU, which in itself is a contracting party to the ECT. Thus, Spain argued that they stem from the same contracting party, namely the EU.[254] Nevertheless, the SCC dismissed the jurisdictional objection relating to intra-EU disputes, with emphasis on the previously decided cases of *Charanne v. Spain, Isolux* and *Eiser v. Spain* and there being no reason to derogate from that stable case law.[255]

Novenergia asked the Svea Court of Appeal to enforce the arbitral award of the SCC in the case.[256] Spain argued that the Svea Court of Appeal shall repeal the arbitral award submitted in the case or declare it null and void.[257] The Court declared that until further notice the enforcement of the arbitral award is suspended.[258] Spain submitted a memorandum in support of its motion to dismiss the petition submitted by Novenergia. In its memorandum Spain outlined its arguments for the dismissal, which are based on the fact that the CJEU already ruled on the incompatibility of ISDS clauses in the Achmea judgement and this therefore must be applied in the *Novenergia* case as

[251] See *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case no. 2015/063, Award of 15 February 2018.
[252] *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case no. 2015/063, Award of 15 February 2018 [cited *Novenergia case*].
[253] Ibid, para. 449-450 and para. 44-45 on the decision to allow the Commission to submit an amicus curiae brief.
[254] *Novenergia case*, para. 450-451.
[255] Ibid, para. 464, 466.
[256] *Petition to Confirm Foreign Arbitral Award*, United States District Court for the District of Columbia, Civil Action No. 1:18-cv-01148, Petition of 16 May 2018.
[257] Svea HovR T 4658-18 *Novenergia II – Energy & Environment (SCA) v Konungariket Spanien*, Beslut om inhibition, 2018-05-18, pg. 1.
[258] Ibid, pg. 1-2.

well.[259] The Commission supported this objection submitted by Spain through the issue of an amicus curiae brief, highlighting the position of the EU based on the Achmea judgment that intra-EU investment arbitration is incompatible with EU law.[260] The brief is in line with the previously issued separate decision by the Commission regarding the renewable energy policy in Spain, whereby the Commission concluded that any ISDS provision is incompatible with EU law.[261] In support of Spain's Motion to dismiss, Spain specifically asked the Swedish Court to seek a preliminary ruling from the CJEU on the compatibility of the ISDS clause contained in the ECT, in order to settle the issue of the extent of the applicability of the Achmea judgement.[262] Currently, there has been no further development on the future outcome of this case as the Swedish Court has not published any decision on the matter.

In the wait for the decision in the *Novenergia* case the discussions on the compatibility of ISDS clauses has developed in the area of extra-EU disputes. The CJEU recently issued an opinion, Opinion 1/17[263], based on the request of Belgium on the compatibility of the Investment Court System (ICS) under the *Comprehensive Economic and Trade Agreement* (CETA) between the EU and Canada. In light of the Achmea judgement, the CJEU outlined that the autonomy of the EU legal order is not simply breached because the CETA ICS is situated outside of the EU judicial system.[264] In detail establishing that the autonomy only would be breached if the CETA tribunal could interpret and apply rules of EU law, apart from the provisions in the CETA itself or

[259] *Spain's Memorandum of Law in Support of Motion to Dismiss and to Deny Petition to Confirm Foreign Arbitral Award*, United States District Court for the District of Columbia, Civil Action No. 1:18-cv-1148, Memorandum of 16 October 2018, [cited *Spain's Memo*] pg. 2.
[260] *Proposed brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Kingdom of Spain* in the case of *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, SCC Case no. 2015/063, Brief of 28 February 2019, pg. 21.
[261] European Commission, '*State aid SA.40348 (2015/NN) — Spain: Support for electricity generation from renewable energy sources, cogeneration and waste'*, (Decision), Brussels, 10 November 2017, C(2017) 7384 final, para. 160.
[262] *Spain's Memo*, pg. 16.
[263] Opinion 1/17, *CETA ISDS compatibility with EU law*, Opinion of 30 April 2019, EU:C:2019:341 [cited Opinion 1/17].
[264] Ibid, para. 115.

issue awards preventing the EU institutions from fulfilling their roles determined in the Treaties.[265] As the CETA is concluded between the EU and Canada, the power of interpretation and application conferred on the tribunal is restricted to the international law applicable between these parties.[266] Consequently, domestic law, which for the EU would be EU law, may only be taken into account as a matter of fact and the CETA would be bound by the interpretation and application thereof as established by the domestic courts, for the EU that would be the CJEU.[267]

Furthermore, the CJEU distinguished the case from the Achmea judgement, as the agreement is concluded between the EU and Canada, which is a third state, and thus the principle of sincere cooperation and the duty to provide an effective judicial protection does not apply, as it only applies between Member States.[268] Additionally, the ICS establishes an tribunal which is situated outside of the EU judicial system and restricted to the interpretation and application of the CETA, it is thus not such a court or tribunal that could or be obligated to request a preliminary ruling under article 267 TFEU.[269]

4.8 Practical effect

All cases outlined above, *Masdar Solar, Vattenfall v. Germany, UP and CD* and *Novenergia* come to the identical conclusion where the ISDS provisions in intra-EU situations still shall be applied. However, every case is peculiar as the argumentation by the tribunals differ, whereas they still build on the established argumentation in the previously determined cases.[270]

The Masdar Solar tribunal denied the application of the Achmea judgement based on the fact that it is silent on the issue relating to multilateral treaties and solely focuses on BITs. The Vattenfall tribunal argued that, in order for

[265] Opinion 1/17, para. 119.
[266] Ibid, para. 122.
[267] Ibid, para. 131.
[268] Ibid, para. 129.
[269] Ibid, para. 135.
[270] See section 4.6-4.7.

the ISDS clause to be invalidated based on EU law, EU law must be such general law which shall be applied in order to determine the interpretation and application of other international agreements, which is not the case. Thus, the tribunal denied the applicability of the Achmea judgment on the Vattenfall case. Furthermore, in the *UP and C.D* case the tribunal concluded that Hungary cannot use EU law and the Achmea judgement to escape its obligations under international law, as the relevant factors in the Achmea judgment were not present in the *UP and CD* case. Ultimately, the arguments by the tribunals differ whereas the outcome remains identical and it remains to be seen whether another aspect will be presented in connection to the *Novenergia* case. In light of the recently published Opinion 1/17, demonstrating the line of argumentation of the CJEU in regard to investment arbitration in general, a sense of hope is provided for the future of investment arbitration.[271]

From the abovementioned arguments, cases and decisions a state is created where Member States must accept arbitral awards where the tribunals ruled that the ISDS clauses are valid and shall be applied and may be asked to be enforced in the Member State, while simultaneously being bound by the Achmea judgement published by the CJEU.[272] The application of the Achmea judgement on multilateral treaties clearly creates a dilemma for the Member States where they must choose which obligations shall be complied with, EU law or international law. As the Member States obligations conflict with each other, this also creates a state of uncertainty for investors as they cannot rely on the ISDS mechanism in intra-EU disputes, which will be analysed further in the analysis below.[273]

[271] See section 4.6-4.7.
[272] See section 3.4 and 4.6-4.7.
[273] See section 5.

5 Analysis and conclusion

The complexity of the application of the Achmea judgment and the immense discussions within numerous legal areas required two separate preliminary research questions in order to understand the third main research question. This structure will be reoccurring in this analysis thereby clarifying the line of argumentation previously presented in this thesis.

5.1 The argumentation of the CJEU regarding intra-EU ISDS clauses

This thesis has outlined the arguments by the CJEU in regard to the incompatibility of intra-EU ISDS clauses with EU law, as established in the Achmea judgement. In order to pinpoint the legal basis of the argumentation the monopoly on dispute settlement was researched, as well as the role of the CJEU within the EU legal system. The argumentation of the CJEU regarding the compatibility of intra-EU ISDS clauses is based on the principle of conferral as it determines the outer frame of the actions of the EU and its institutions, including the CJEU. All actions shall be based on the attempt to achieve certain objectives laid out in the Treaties.[274] The CJEU shall specifically ensure the harmonious interpretation and application of EU law and thereby the power has been conferred on them in article 267 and 344 TFEU, outlining the preliminary reference system and exclusive jurisdiction on dispute settlement. It is, however, clear that the actions of the CJEU are restricted to issues falling within the scope of EU law. Within that, the CJEU established a doctrine of field pre-emption by connecting article 19 TEU regarding the duty to provide effective judicial protection to article 267 TFEU and thereby preventing the application of any other rules than those laid out in EU law in fields within the scope of EU law.[275]

[274] See section 2.1-2.2.
[275] See section 2.4.1.

Evidently the CJEU plays a vital role in determining the scope of the EU law and has been met by criticism when concluding its judicial activism. The highly debated and criticised Achmea judgement concerning an intra-EU BIT which was concluded prior to EU membership of the involved Member States is part of the ongoing discussion of the compatibility of the commonly used ISDS mechanism with EU law.

As set forth above this mechanism is used in both bilateral and multilateral treaties and it is not surprising that the Achmea judgement led to discussions even outside of the EU. The Achmea judgment represented a hope for a solution where the intra- EU ISDS mechanism could maintain while still complying with the obligations under EU law, specifically the duty of sincere cooperation.[276] The CJEU, however, strongly promoted EU law and disregarded the Member States obligations under international law. In short, the CJEU based its argumentation in Achmea on the fact that certain parts of the BIT and EU law overlap and thereby falling within the scope of EU law. Consequently, the exclusive jurisdiction of the CJEU must be applied which leads to the incompatibility of the ISDS clause with EU law, based on article 267 and 344 TFEU as it breaches the exclusive jurisdiction of the CJEU in regard to dispute settlement and the autonomy of the EU legal order.[277]

The CJEU does in its ruling not go further than declaring the ISDS clause in the BIT as incompatible. With this case a discussion emerged regarding the future of the ISDS mechanism within several legal areas. In connection thereto, one must remember the unique character of the Achmea judgment. It has already been laid out that the Achmea judgment was peculiar as it was one of the few investment arbitration cases where the investors claim focused on the provisions of free movement instead of the investment protection rules. Consequently, the CJEU could determine that it fell within the scope of EU law, while EU law does not contain rules on investment protection and thus

[276] See section 3.4.
[277] See section 3.4.2.

the overlap would have been slight in cases regarding the investment protection rules. As a consequence, the Achmea judgement differs to many other investment arbitration cases and the application of the Achmea judgement may be rejected as the relevant factors differ.[278]

It is clear that the issue of intra-EU ISDS clauses is not finally settled through the Achmea judgement as there are areas that are not directly covered by the judgement.[279] Specifically the question of the compatibility of ISDS clauses in multilateral treaties remained unanswered, although the question was highlighted by AG Wathelet, yet completely disregard by the CJEU.

5.2 The application of the Achmea judgment on the ISDS clause in the ECT

When reading the Achmea judgment, multilateral treaties are not specifically expressed. Nevertheless, the EU institutions, primarily the Commission has argued for an extensive application of the Achmea judgement in connection to multilateral treaties such as the ECT. Therefore, the allotment of competences between the EU and the Member States, specifically in regard to ISDS clauses, was researched in this thesis in order to determine the compatibility of ISDS clauses in the ECT with the EU law. The presented research outlines that the allocation of competences in the external arena is governed by the Treaties and the powers conferred thereunder. In regard to dispute settlement specifically, the competence is held to be exclusive for the EU and the Member States may not through international agreements withdraw disputes from the EU judicial system.

In connection to the allocation of competences between the EU and the Member States, article 351 TFEU on the validity of international agreements entered into by Member States is brought into the debate. The provision determines the obligation of the Member States to remove existing

[278] See section 3.4.3.
[279] See section 3.4.3.

incompatibilities in these international agreements with EU law. The EU has consistently argued that Member States have agreed that EU law will prevail, in regard to bilateral investment agreements between two Member States, through the EU membership.[280] In regard to multilateral treaties, specifically the ECT, this is however not the case, as other third states are contracting parties as well. The ECT was used as the primary example as the Commission stated that the Achmea judgement must be applied to any clause which opens up for the possibility of submitting intra-EU investor state disputes to a body situated outside of the EU judicial system. Further, the Commission outlined that the fact that the EU itself is a party to the ECT does not change that position, as that only creates rights between the EU and third states but not between Member States. The internal perspective of the EU clearly promotes the exclusive jurisdiction of the CJEU in regard to all dispute settlement, thereby proposing that the EU itself may conclude international agreements containing ISDS clauses while these clauses shall be disapplied in intra-EU disputes.[281]

The opinion of the international tribunals differs substantially from the EU perspective and the cited arbitral awards and decisions lead to the conclusion that the Achmea judgment does not have any bearing on ISDS clauses in the ECT. Some of the cases simply state that the Achmea judgment did not focus on multilateral treaties and thereby is silent on the issue whereas the Vattenfall decision is a detailed and well-reasoned decision where the role of EU law within the international legal system is outlined. The argumentation presents the options for termination or declaration of invalidity of the ISDS clause based on the applicable law. The multilateral treaty, the ECT, is governed by the ECT itself and public international law, more specifically the VCLT, as it is an agreement which is applicable on the interpretation of other international agreements. In order for EU law to determine the validity or termination, it must be such a general law which is applicable on the interpretation and application of international agreements. EU law, however,

[280] See section 3.3.
[281] See section 4.5.

is only applicable between Member States and cannot determine the applicability of an ISDS clause agreed upon in an international agreement. The Member States and the EU have committed themselves to the fulfilment of this agreement and that includes the provisions contained therein on dispute settlement. International tribunals therefore strongly reject the applicability of the Achmea judgement on the ISDS clause in the ECT, as the facts differ from the relevant factors in the Achmea judgment. The tribunals thereby strongly promote the restriction of expanding the EU's and CJEU's power in the international legal field further than explicitly conferred upon them in the Treaties and established under international law.[282]

5.3 Analysis of the compatibility of the Achmea judgement with the Member States obligations under international law

The third and final research question concerns the analysis of the distinction of the argumentation brought forward by the EU institutions and international tribunals on the applicability of the Achmea judgment on the ECT as well as the effects of this distinction on the ISDS mechanism within the EU. It is evident that the EU and the international tribunals are on the opposite side of the spectrum regarding the applicability of the Achmea judgment on the ECT. Reading the Achmea judgment and the Vattenfall decision alongside each other, highlights the different perspectives from which the EU respectively the international tribunals look at the issue. The CJEU's main goal is to ensure the primacy and enforcement of EU law whereby the exclusive jurisdiction of the CJEU in regard to dispute settlement must be protected, in order to achieve the objectives agreed upon in the Treaties. In contrast, the international tribunals focus on the obligations between the contracting parties based on the investment agreement existing between them.[283] The

[282] See section 4.6.
[283] 'Intra-EU ECT Claims Post-Achmea: Vattenfall Decision Paves the Way', Kluwer Arbitration Blog, Kristin Schwedt and Hannes Ingwersen, 13 December 2018,

perspective and the aspiration of respectively the tribunal and the CJEU are distinct, which limits the possibility of an uniform outcome. Continuing on this path, the CJEU bases its decision solely on EU law as its role within the EU legal system is to interpret and apply EU law. In contrast, the international tribunals base it on international law, which forms the basis of the tribunal's existence, specifically the ECT and the VCLT. The tribunals have determined that EU law will not be applicable regarding the question of termination or invalidation of a clause established in an international investment agreement and therefore the application of EU law is restricted to solely intra-EU relationships. When the perspective, aspiration and applicable law diverge to this extent the conclusions must contradict.[284]

Furthermore, the argumentation of the CJEU in the Achmea judgement is based on the fact that the contracting parties in the BIT have entered into the EU and thereby accepted the exclusive jurisdiction of the CJEU. This is not the case in multilateral treaties such as the ECT as there are parties to that treaty that are not part of the EU and therefore the BIT and its ISDS clause cannot be disapplied simply because some of the contracting parties also are EU Member States. The disapplication of the ISDS clause in the ECT would provide a situation where article 26 ECT still will apply for certain states and certain disputes while being declared inapplicable in other cases simply because these states also have entered into another international agreement, the EU Treaties. In my opinion, the argumentation in the *Vattenfall decision* is quite convincing as EU law is simply an international agreement between certain states, but it is not such a treaty in international law used in order to interpret and apply other international treaties. Consequently, the power of the EU Treaties is restricted within the international field. The CJEU may disagree but the ruling of the CJEU declaring that its exclusive jurisdiction should be applied does not give the EU more power in the international arena than specifically provided for in the Treaties. Future cases such as the

<http://arbitrationblog.kluwerarbitration.com/2018/12/13/intra-eu-ect-claims-post-achmea-vattenfall-decision-paves-the-way/>, accessed 2019-04-12.
[284] See section 3.4 and 4.6-4.8.

Novenergia case may expand the application of the principle laid out in the Achmea judgement, which in itself will bind the Member States. International law and international tribunals will, however, not back down based on a ruling from the CJEU, as it does not have any bearing on the Member States obligations established through the conclusion of international agreements. The common principle of *pacta sunt servanda*[285] must be remembered and the Member States will struggle to simultaneously comply with its EU membership obligations and the obligations under international law if the Achmea judgement is applied to multilateral treaties.

Through these split opinions and conclusions, a dilemma is created for the affected Member States and EU investors. They have two different directions to follow, one in which ISDS clauses are declared incompatible with EU law and thus should not be applied and one where the ISDS clauses should be applied in order to respect the obligations under international law. For investors this creates a state where they cannot rely on the ISDS clauses in intra-EU cases, both in bilateral and multilateral treaties, as it may be declared incompatible and thereby be disapplied. With the *Novenergia* case in mind, this could potentially remove intra-EU investment arbitration altogether as an option for investors seeking to settle disputes with Member States. This could further potentially lead to investors seeking arbitration in non-EU states as it thereby would ensure that the national courts of Member States would not be able to review the award and within that review be bound by EU law. Consequently, the declaration of inapplicability based on EU law would be restricted. Furthermore, this may also provide an incentive for EU investors to structure their investment through a subsidiary outside of the EU instead. Consequently, EU investors may have to explore other alternatives in order to ensure investment protection and the enforcement thereof.[286] ISDS provided a predictability for investors in order to ensure that the obligations

[285] See appendix.
[286] 'The aftermath of Achmea: where do we stand?', Thomson Reuters Practical Law Arbitration Blog, Georgios Fasfalis, 2 January 2019, <http://arbitrationblog.practicallaw.com/the-aftermath-of-achmea-where-do-we-stand/>, accessed 26 April 2019.

under the investment treaty are enforced in the host state where the investment is situated.[287] The previously investor-friendly ISDS mechanism is after the divergence in the legal opinions no longer a system an investor can completely rely on in intra-EU disputes.[288] The incompatibility of the ISDS clause in the ECT in intra-EU disputes would categorically result in the varying reliability of investment arbitration as the ISDS clause still would apply in regard to extra-EU disputes based on investments in third states. The same provision will therefore be declared incompatible in some disputes while being upheld in other disputes, providing inconsistency for investors and the investments concluded based on the reliability on the enforcement of the provisions in the ECT.

Further, the divergence of opinion on the compatibility of ISDS clauses with EU law has not only had effects on the investors but also on the Member States and the EU legal system. The disagreements between Member States, as has been presented above in the case law, on the extent of the application of the Achmea judgement has created tensions between the EU legal system and the international legal system. The position of the individual Member States will however not affect the opinion of the tribunal in the specific case as it is a fundamental principle in international arbitration law that the tribunal will determine its own jurisdiction, as outlined in the *Vattenfall decision*. The continuing promotion of the validity of the jurisdiction of international tribunals may be of little value if the Member States are bound by EU law and thereby may prevent the enforcement of the arbitral awards within the territory of the Member State. The *Novenergia* case demonstrates this ongoing tension between the legal systems and the negative effect created on the enforcement of both EU law and arbitral awards. The discussions and argumentations presented can be regarded as a battle for the continuing

[287] See section 3.1.
[288] See for further discussion 'The Post-Achmea EU: Uncertainty in the Face of Change', The American Review of International Arbitration, Gabriel Anaya, 25 January 2019, <http://aria.law.columbia.edu/the-post-achmea-eu-uncertainty-in-the-face-of-change/>, accessed 2019-04-26.

existence of the ISDS mechanism within international law, strongly supported by some actors while rejected by others.

The demonstrated tension and divergence of opinions struck in another direction by the recently published Opinion 1/17.[289] Although this thesis focuses on intra-EU ISDS clauses this brings another dimension to the topic. The Opinion highlights the differences of multilateral treaties and the factors in the Achmea judgement. The Opinion declares the ICS in CETA as being compatible with EU law as the powers conferred on the tribunal are restricted to the interpretation and application of the CETA and limits putting the harmonious interpretation and application of EU law at risk. It is further highlighted that the mere fact of situating a tribunal outside of the EU judicial system does not in itself entail a breach of the autonomy of the EU legal order. The opinion focuses on the relationship between the EU and Canada and is therefore an opinion within the extra-EU sphere. Nevertheless, it cannot be disregarded that it brings back hope for investment arbitration and demonstrates a model which is consistent with the EU legal order and may be applied in future investment agreements. The established system of ISDS mechanisms has clearly been jeopardized by the development of EU case-law which now has opened up for a new era containing systems compatible with EU law. The power of the EU and the CJEU cannot and will not be underestimated in the establishment and continuing validity of international agreements and clauses contained therein.

5.4 Conclusion

In conclusion, the exclusive jurisdiction of the CJEU is at the centre of the Achmea judgment which is argued by the Commission to have an extensive area of application. Accordingly, it shall be applied to bilateral and multilateral treaties such as the ECT, whereby the ISDS clause shall be disapplied in intra-EU disputes. The Achmea judgement strengthened a tension between EU law and international law that already existed prior to the

[289] See section 4.7.

judgement. The opinions are as split as they possibly can be in this context and no solution is in sight where an agreement would be found that would satisfy both the EU and the actors in investment arbitration. International arbitration has been accepted in regard to commercial arbitration but the equivalent conclusion is not in sight for investment arbitration. Consequently, the EU will most likely continue on its path declaring that ISDS clauses are incompatible with EU law in intra-EU cases. The Novenergia case will hopefully provide more answers than questions regarding the ISDS clause in the ECT.

In order to answer the main research question regarding the arguments by the CJEU and the international tribunals one can conclude that the arguments and conclusions differ as they are built on different legal systems and aspirations. This creates a state of legal uncertainty for the investors as well as the Member States, because the rulings of the CJEU and of the international tribunal conclude differently to an extent where the Member States cannot respect both aspects simultaneously. The CJEU should not undermine the effects that the declaration on the incompatibility of the ISDS mechanism has on EU investors but also on investment arbitration in general within the EU. Investors may have to look elsewhere in order to secure the protection of their investments and that does not only have legal consequences but also political and economic effects on the Member States. The Achmea judgement and Opinion 1/17 demonstrate the power of the EU and the CJEU in the intra-EU aspect as well as external relations. The bitterness of international tribunals and the rejection of the judgement are to no surprise as the EU thereby enforces its own exclusive jurisdiction while undermining the ISDS mechanism and threatening the pure existence of intra-EU investment arbitration altogether.

Appendix

Glossary

amicus curiae	an impartial advisor to a court of law in a particular case
mutatis mutandis	making necessary alterations while not affecting the main point at issue
pacta sunt servanda	agreements must be kept

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