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Challenges of the International Investment Arbitration-Influence of the *Achmea* Case

**Shin-Ying (Chloe) Tsai*

1 Introduction

The European Court of Justice (hereinafter “CJEU”) rendered its landmarking decision on the *Achmea* Case (hereinafter “*Achmea-CJEU*”) in May 2018, rattling the investment arbitration world. Looking back one year after the case was initially rendered, the dust set off by *Achmea-CJEU* still has not settled and has continued to influence the investment arbitration regime in various degrees and perspectives. The stakeholders of *Achmea* include: non-EU States, EU Member States, European Commission, investors, domestic courts, and the tribunals constituted under intra-EU BITs.¹

The purpose of this paper, therefore, is to analyze the *ex-ante* and *ex-post* effects of *Achmea*, to achieve two goals. First, to ensure the legality of *Achmea-CJEU*, by applying *Achmea* under international law. Second, the effect of *Achmea* and the EC termination policy of intra-EU BITs. To achieve these goals, this paper will discuss whether the judgment of *Achmea-CJEU* has correctly applied the applicable law agreed by the bilateral investment treaties (hereinafter “BIT.”) The *Achmea-CJEU* arbitrarily decided the case over European Union (hereinafter “EU”) law, based on threefold (1) dissimilarity between EU Member; (2) conflict of EU Law and substantive standards in the BIT, and (3) the existence of a parallel system of adjudication that

¹ Deyan Dragiev, 2018 *In Review: The Achmea Decision and Its Reverberations in the World of Arbitration*, KLUWER (Jan. 16, 2019), available at <http://arbitrationblog.kluwerarbitration.com/2019/01/16/2018-in-review-the-achmea-decision-and-its-reverberations-in-the-world-of-arbitration/>.

threatens the control of European Union.² The *Achmea-CJEU* decision was particularly silent on the application of the 1969 Vienna Convention on the Law of Treaty (hereinafter “VCLT”)³ and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter “New York Convention.”)⁴

This paper will further analyze and provide further suggestions on the rights and obligations of relevant parties, based on recent decisions of tribunals, the court set aside awards and enforcement requests, with stakeholders including investor-states, investors with claims arising within intra-EU BITs with relevant clauses. Due to research limitation, Energy Charter Treaty (hereinafter “ECT”) will be referred to but will not be part of the main discussion of this paper.⁵

Some figures over the intra-EU BITs is helpful to understand who the potential stakeholders are *post-Achmea*. There are in total 174 intra-EU BITs cases (before July 2018), which amounts to 20 percent of all ISDS cases around the world. The typical repeat players as a defendant are Spain (40 cases), Czech-Republic (30 cases) and Poland (19 cases) against investors from the Netherlands, Germany, and Luxembourg.⁶ As EC has correctly provided in its EC-Declaration,

² Ursula Kriebaum, *The Fate of Intra-EU BITs from an Investment Law and Public International Law Perspective*, 2015 ELTE L.J. 27, available at <https://eltelawjournal.hu/fate-intra-eu-bits-investment-law-public-international-law-perspective/>.

³ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 UST 2 517, 330 UNTS 3.

⁵ Declaration of the Representative of the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union (hereinafter “EC-Declaration”) ¶1 (Jan. 15, 2019), available at https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf (EC found the arbitration clause in the Energy Charter Treaty was also incompatible with EU law and thus the arbitration clause may not be raised); See Communication “Protection of intra-EU investment” adopted by the Commission on 19 July 2018 (Com (2081)547 final) ¶3-4.

⁶ United Nations Conference on Trade and Development Prosperity for All (hereinafter “UNCTAD”), F

95 percent of the intra-EU cases were based on BITs signed either in the 1990s or earlier. There are 83 intra-EU cases pending (before July 2018).⁷ European Commission (hereinafter “EC”) has rendered a declaration to suggest Member States provide tribunals and courts of ongoing cases of *Achmea-CJEU* decision in persuasion to set aside or to rule in favor of the Member State.⁸

2 History of EU Law and Investment Arbitration Law-Stirring Toward Nationalism

EC back in 2006 had shown signs of unfavorable position toward intra-EU investments when for the first time it recommended Member States to terminate intra-EU BITs.⁹ Historically, the intra-EU BITs were mainly agreed by the Member States in the 1990s to reassure investors who were wary of the investment environment based on historical political reasons. When more States joined during the enlargement of EU around 2000, the discussion over the difference of each State’s intra-EU BITs was left out of the picture.

Now, EC is concerned that the intra-EU BITs is challenging the solidarity of the EU, the forum-shopping of investors, and the discrimination based on nationality in BIT awards. Most important of all, the notion behind EC’s action is EU as a single market the EU law should have hierarchy over BITs which contains investor-state dispute settlement (hereinafter “ISDS”) that could render contradictory decision to the EU law. EC claims the intra-EU BITs sets a parallel

act Sheet on Intra-European Union Investor-State Arbitration Cases (Dec. 2018), available at https://unctad.org/en/PublicationsLibrary/diaepcb2018d7_en.pdf.

⁷ *Id.*

⁸ Declaration of the Representative of the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union ¶1 (Jan. 15, 2019), *available at https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf.*

⁹ Damon Vis-Dunbar, *EU Member States reject the call to terminate intra-EU bilateral investment treaties*, IIS D (2009), *available at <https://www.iisd.org/itn/2009/02/10/eu-member-states-reject-the-call-to-terminate-intra-eu-bilateral-investment-treaties/>.*

treaty system overlapping with the Single Market Rule.¹⁰ However, this concept of termination was quickly rejected by most of the Member States that wished to maintain the existing intra-EU BITs mechanism.¹¹

A few States have terminated their intra-EU BITs, such as Italy (2012), Ireland (2013) and Romania (2017). Later on, EC continued to request Member States to bring their intra-EU BIT to an end, by initiating infringement proceedings against certain Member States, but EC's effort was in vain.¹² EC further raised these concerns and tested the argument in the *Eastern Suger v. Czech Republic* brought under the Netherlands-Czech Republic BIT.¹³ The Tribunal rejected EC's reasoning finding it was neither clear nor binding.¹⁴

Achmea was the perfect opportunity EC was waiting for.¹⁵ Swiftly after the *Achmea-CJEU* judgment, EC finally reached consensus among the EU members that all Intra-EU BIT shall be terminated before Dec. 6, 2019. The overall position of EC and the decision of CJEU shows signs of nationalism to the EU investment arbitration regime. EC's strategy over the intra-EU BIT on its face would only affect the EU investors. However, the ripple effect of the judgment was EC also had urged tribunals and domestic courts outside the EU to rule in favor of the EU Member

¹⁰ Communication from the Commission to the European Parliament and the Council- Protection of intra-EU Investment, COM (2018) 547 final ¶2, 19.7.2018, available at <http://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-547-F1-EN-MAIN-PART-1.PDF>.

¹¹ VIS-DUNBAR, *supra* note 9; Christophe von Krause, *The European Commission's Opposition To Intra-EU BITs And Its Impact On Investment Arbitration*, KLUWER ARBITRATION BLOG (Sep. 2010), available at <http://arbitrationblog.kluwerarbitration.com/2010/09/28/the-european-commissions-opposition-to-intra-eu-bits-and-its-impact-on-investment-arbitration/>.

¹² EC, *Commission asks Member States to terminate their intra-EU bilateral investment treaties (June 2015)*, available at http://europa.eu/rapid/press-release_IP-15-5198_en.htm

¹³ See *Letter of the European Commission, Internal Market and Services of 13 January 2006* quoted in *Eastern Sugar B.V. v. Czech Republic*, Partial Award ¶24-26 (2007); *Eureko BV (The Netherlands) v. The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension ¶ 180-82 (2010).

¹⁴ KRAUSE, *supra* note 11.

¹⁵ DRAGIEV, *supra* note 1.

States.

3 The *Achmea* Case - From the Start

Achmea went through several stages within different legal systems. Starting from the tribunal of Permanent Court of Arbitration (hereinafter “PCA”) in 2010¹⁶ to the Frankfurt Higher Regional Court¹⁷ and Federal Court of Germany¹⁸, and finally working its way up to the CJEU.¹⁹

3.1 UNCITRAL Arbitral Awards Based on ISDS

The dispute started from Achmea B.V. (originally Eureka), a Dutch company against Slovakia under UNCITRAL Arbitration Rules and administered by PCA in 2010 based on the 1991 Netherlands-Slovakia BIT.²⁰ Achmea B.V. provided insurance products via subsidiary starting from 2004 to Slovakia, but only to find in 2006 the change of power in government reversed the original liberalized health insurance market. The seat of arbitration was set in Germany. The tribunal dismissed the argument of EU that if the same subject would be regulated by the EU law and the decision of a tribunal under the BIT, EU law would prevail. The tribunal understood this argument to mean that it only had jurisdiction to rule on the breach of non-EU law of the Slovak Republic (host state in *Achmea*).²¹

¹⁶ Achmea B.V. (formerly Eureka B.V.) v. The Slovak Republic (I) (PCA Case No. 2008-13), Award on Jurisdiction, Arbitrability and Suspension (Oct. 2010).

¹⁷ Frankfurt Higher Regional Court, Decision, Case 26 Sch 3/13, (Dec. 18, 2014).

¹⁸ German Federal Court of Justice, Decision, Case I ZB 2/15 (Oct. 31, 2018).

¹⁹ Slovakische Republik (Slovak Republic) v. Achmea BV, Court of Justice of the European Union, Judgment, Case C-284/16 ¶101 (Mar. 6, 2018).

²⁰ *Id.*

²¹ Achmea B.V. (formerly Eureka B.V.) v. The Slovak Republic (I) (PCA Case No. 2008-13), Award on Jurisdiction, Arbitrability and Suspension ¶274 (Oct. 2010).

The tribunal emphasized that nothing in the Netherlands-Slovakia BIT was actually in direct conflict with the EU law, and the award itself had nothing to bear upon any questions of EU law.²² The tribunal continued to find that the Netherland-Slovakia BIT was not terminated in accordance with Art. 59 of the VCLT because (1) notification was not provided; (2) the successive treaty does not relate to the same subject-matter as the entire BIT and Art. 59 of VCLT requires a broad incompatibility between the two treaties in question; and (3) the investors right to bring UNCITRAL arbitration proceedings cannot be equated simply with the legal right to bring legal proceedings before the national courts of the Host State.²³ Furthermore, the tribunal stated CJEU has no interpretative monopoly on EU law rather CJEU only has a monopoly on the final and authoritative interpretation of EU law. The fact that at the merits stage, the tribunal might have to consider and apply provisions of EU law does not deprive the tribunal of jurisdiction. Eventually, the tribunal issued an award in favor of the investor Achmea B.V. in 2012 and ordered Slovakia to pay damages to Achmea B.V.

3.2 Decision of the Federal Court of Germany

Slovakia quickly sought to set aside the award in the Higher Regional Court of Frankfurt (hereinafter “Achmea-Frankfurt”), based on the same point provided by EC, that the Netherlands- Slovakia BIT was contrary to the law of the Treaty of the Function of European Union (hereinafter “TFEU”). Achmea-Frankfurt upheld the Arbitral Award. Slovakia further

²² *Id.*, at 276.

²³ *Slowakische Republik (Slovak Republic) v. Achmea BV*, Court of Justice of the European Union, Judgment, Case C-284/16 (Mar. 6, 2018).

appealed to the Federal Court of Germany which submitted a request for preliminary ruling of the CJEU and decided to stay the case until the CEJU made further decision.

From the reference of *Achmea-CJEU* judgment, it showed that the Federal Court of Germany made a preliminary analysis before sending the question for CJEU to decide. The Federal Court of Germany found the EC's interpretation of Art. 344 of TFEU would make the Netherlands-Slovakia BIT dispute resolution clause without any meaning, for the investors would not be able to bring dispute anywhere in the EU.²⁴ Furthermore, Art. 344 of TFEU could not be understood to give EU courts hierarchy over dispute resolution venues decided by parties but should be understood as securing the autonomy of EU laws when Member States were to bring claim under the EU courts.²⁵ On the issue of TFEU Art. 267, the Federal Court further provided that Art. 267 cannot be interpreted to preclude arbitration clauses in the intra-EU BITs. It further offered an alternative route. If EC was concern over the uniformity of EU law, it could be ensured by requesting the domestic court of Member State to review the compatibility of the TEU law before enforcement. If the award were to be in contrast with EU law, the courts could set aside the award on the ground enforcement would be against public policy.²⁶

A year before CJEU made an official decision, the Advocate General (hereinafter "AG") of CJEU Melchior Wathelet, against the contention of Slovakia in *Achmea*, found the intra-EU BITs were compatible with the EU law and do not contrast the Art. 267 & 344 of TFEU.²⁷ Despite the

²⁴ *Id.*, at 17 (Mar. 6, 2018) ("The Treaties make no provision for any judicial procedure in which an investor such as Achmea can bring a claim, before the EU judicature")

²⁵ *Id.*

²⁶ *Id.*, at 20.

²⁷ GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION (ANDREA GATTINI ET AL. ED.), BRILL NIJHOFF 79-80 (2018).

support of the AG, things quickly turned in the opposite direction.

3.3 *Judgment of CJEU and Compliance of the Federal Court of Germany*

Differing with the opinion of the CJEU AG, the *Achmea-CJEU* found the arbitration clause in the Netherlands-Slovakia BIT to be incompatible with TFEU because it adversely affected the autonomy of EU law.²⁸ *Achmea-CJEU* answered the preliminary question of the Federal Court of Germany, respectively, but without much clarity. It relied heavily on the facial interpretation of the TFEU and EC Opinion 2/13 that the autonomy of EU law should be protected. *Achmea-CJEU* further implied in several places in its judgment that the EU law has the hierarchy over international law, as provided:

[A]ccording to settled case-law of the Court, the autonomy of EU law with respect both to the law of the Member States and to international law is justified by the essential characteristics of the EU and its law, relating in particular to the constitutional structure of the EU and the very nature of that law[...]

Achmea-CJEU also stated in another paragraph, that “[a]ccording to settled case-law of the Court, an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system, observance of which is ensured by the Court...”²⁹

Further in response to the Federal Court of Germany’s questions and proposed solutions to TFEU Art. 267, *Achmea-CJEU* first found a tribunal constituted under Art. 8 of the BIT was not a

²⁸ *Slowakische Republik (Slovak Republic) v. Achmea BV*, Court of Justice of the European Union, Judgment, Case C-284/16 ¶19 (Mar. 6, 2018).

²⁹ *Id.*, at 32-35.

Member State tribunal or legal venue, and could, therefore, rule freely in contrast with EU law.³⁰ Other concerns of *Achmea-CJEU* were the award of the tribunal was final,³¹ and the tribunal was to freely choose the seat of arbitration, implying the tribunal had the power to choose the law that reviewed the validity of the award, and referring the decision was basically out of the control of EU.³² As for the review of the award via Member State's domestic court *Achmea-CJEU* simply found the domestic court's reviews are limited without providing much explanation.³³

A few month later, on October 2018, the Federal Court of Germany referring to the CJEU's decision verbatim set aside the final award of *Achmea* holding there is no valid arbitration agreement between the parties based on the Netherlands-Slovakia BIT. ³⁴

The main question from hindsight, therefore, turns to under which applicable law did the CJEU judgment concluded that there is no valid arbitration agreement, and if applying international law analysis to the case, would the decision be any different of the CJEU. The tribunal did try to answer this question initially in the arbitral award. It stated that EU law may have a bearing upon the scope of rights and obligations under the BIT by virtue of its role as part of the applicable law under BIT Article 8(6) and German law as the *lex loci arbitri*, but further stated that it is a question for the merits stage, not a question that goes to jurisdiction.³⁵

3.3.1 Autonomy and Supremacy of EU Law-the CJEU Judgment in 2018

³⁰ *Id.*, at 49-50.

³¹ *Id.*, at 51.

³² *Id.*

³³ *Id.*, at 53.

³⁴ Federal Court of Justice (Bundesgerichtshof), Decision, Case I ZB 2/15 (Mar. 3, 2016).

³⁵ *Slowakische Republik (Slovak Republic) v. Achmea BV*, Court of Justice of the European Union, Judgment, Case C-284/16 (Mar. 6, 2018).

Two rules under the fundamental law of EU – the TFEU Art. 344 and Art. 267 were claimed to be violated. TFEU Art. 344 concerns EU Member States shall be prohibited from submitting disputes concerning the *interpretation and application of EU law (emphasis added)* to dispute settlement mechanism other than those provided straightly in EU founding treaties. Therefore, first, the PCA tribunal did not qualify as *court or tribunal of a Member State (emphasis added)* under pursuant to Art. 267 of the TFEU. The primary purpose was to ensure the autonomy and supremacy of EU law.³⁶

Reviewing Achmea-CJEU's argument, it stated that the PCA tribunal could interpret the EU law on possible infringement of BIT and subject to limited judicial review by EU Member State domestic courts.³⁷ Moreover, the investment arbitration interpretation could threaten the application of EU law and have an adverse effect on the autonomy of the uniform and effectiveness of EU law,³⁸ which are enshrined in Art. 267 and 344 of the TFEU.³⁹ Since on the first tier, the CJEU found the context of the BIT itself was a violation of the EU law, therefore was no discussion over the non-discrimination principle.⁴⁰

There are many perspectives when referring to the autonomy of EU law. The EU law has both external autonomy (the relationship between EU law and international law), and internal autonomy, which is the relationship between EU law and national law. There is also the judicial autonomy of the EU law, which is embedded in Art. 19 of the TFEU which shows the role and

³⁶ *Id.*, at ¶33.

³⁷ *Id.*, at ¶50-53.

³⁸ *Id.*, at 37, 56, 58.

³⁹ *Id.*, at 59.

⁴⁰ Florian Stefan, *Brace for Impact? Examining the reach of Achmea v Slovakia* (June 2018), available at <http://arbitrationblog.kluwerarbitration.com/2018/06/24/brace-for-impact-examining-the-reach-of-achmea-v-slovakia/>.

prerogative of the CJEU to be assigned by EU to be the sole authority to interpret EU law, including the validity and interpretation of it.⁴¹ Under this theory, only a binding or definitive interpretation of the EU law by the arbitral tribunal can the BITs be of violation of the EU law. However, as provided by the Federal Court of Germany, and the PCA tribunal, the award was never intended to interpret the EU law definitely, and even if it would wish to do so it was not authorized under the intra-EU BIT. In any event, the domestic courts have the power to review during enforcement of the award.

In short conclusion, CJEU by accepting EC's argument tried to resolve the EC's nightmare of (1) the BITs giving legal institutions outside of EU may have the power to interpret or apply EU law freely, and a more subtle reasoning; (2) that these legal institutions are not tribunal of an EU member state under Art. 267 of the TFEU and thus could not request for CJEU to provide a preliminary ruling. In sum, CJEU would not be able to adjudicate or interpret the EU law under the intra-EU BIT. However, the main reasoning of the CJEU was straight forward more policy and fact-driven instead of a proper legal analysis.

3.3.2 From the Lenses of International Law

There is no doubt that *Achmea-CJEU* judgment has been the cornerstone of investment arbitration of 2018, but the context of the judgment has also caused considerable confusion. As

⁴¹ GENERAL INTEREST OF HOST STATES IN INTERNATIONAL INVESTMENT LAW (GIORGIO SACERDOTI ET AL. ED.), CAMBRIDGE UNIVERSITY PRESS 270 (2014); Opinion of the Court of 14 December 1991. - Opinion delivered pursuant to the second subparagraph of Article 228 (1) of the Treaty. - Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area (hereinafter "Opinion 1/91") (Dec. 1991); Opinion pursuant to Article 218(11) TFEU – Draft international agreement – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties (hereinafter "Opinion 2/13") (Dec. 2014).

the dispute aroused from a BIT between states, VCLT has set out specific rules for the interpretation of BITs. However, the judgment was silent on this matter.⁴² VCLT was not mentioned once in the *Achmea-CJEU* judgment. It is impossible to rewind the time or force explanation out of the court, but one cannot wonder if the *Achmea* was to be explained under VCLT would the outcome be any different from the CJEU judgment. As the tribunal of *Achmea* has correctly stated: “*Whatever legal consequences may result from the application of EU law, those consequences must be applied by this Tribunal within the framework of the rules of international law and not in disregard of those rules.*” Therefore, this paper aims to apply *Achmea* through the lenses of international law.

At the first tier, the main question of *Achmea* remains whether Art. 8 of the Netherlands-Slovakia BIT can be interpreted as being against the autonomy of EU law. By applying VCLT to EC’s argument, the first noticeably clause would be under Art. 27 VCLT, EC should not be able to be shield under internal law to justify the failure of the performance of the treaty.⁴³ The main issue thus would be whether EU law would fall under the internal law, given EU law’s unique characteristic.

EC had not explicitly answered to Art. 27 of VCLT, but through the implication of its argument in the *Achmea-CJEU*, by EC’s wording, EU law is seen as internal law by the EU. As mentioned by EC by referring to “*autonomy of the EU legal system,*” “the autonomy of EU law [...] is justified by the essential characteristics of the EU and its law, relating in particular to the

⁴² DRAGIEV, *supra* note 1.

⁴³ VCLT Art. 27 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.”)

*constitutional structure of the EU and the very nature of that law (emphasis added)."*⁴⁴

On the second tier, responding to EU's latter argument, which was absent in court but provided in EC-Declaration six-month after the *Achmea-CJEU* judgment, of raising *lex posterior*, mentioning that the principle exists in customary international law, and thus, EU law succeeds intra-EU BITs.⁴⁵ There is the need to bear in mind that during *Achmea-CJEU*, EC's argument was the automatic preclusion of intra-EU BIT by contradicting EU law and thus leading to the loss of jurisdiction by the tribunal. EC did not argue *lex posterior* or termination *per se* of the intra-EU BIT under the rules of VCLT.

But responding to the issue under international law, by applying Art. 59 of VCLT, a treaty shall be considered "terminated" if (1) all parties to the treaty conclude a later treaty; (2) relating to the "*same subject matter (emphasis added)*", and (3) all parties intended the matter should be governed by the latter; or (4) the provisions of the treaties are so far "*incompatible that the two treaties are not capable of being applied at the same time (emphasis added)*". The prerequisite requirement to raise Art. 59 of VCLT in the first place has not been met in *Achmea*, even if EC intended to base its argument on Art. 59(1)(b) of VCLT that the provisions between the Netherlands-Slovakia BIT were incompatible as to not being able to be applied at the same time. All EU Members may have the intention to terminate intra-EU BITs, but it could be too far-fetch to argue that the intra-EU BITs and the EU law as a whole relate to the same subject matter. This

⁴⁴ *Slowakische Republik (Slovak Republic) v. Achmea BV*, Court of Justice of the European Union, Judgment, Case C-284/16 ¶33 (Mar. 6, 2018).

⁴⁵ Declaration of the Representative of the Governments of the Member States of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union ¶1 (Jan. 15, 2019), available at https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf.

is also supported by past awards, such as in the case of *WNC Factoring Ltd. v. Czech Republic*, the tribunal decided that EU law and BITs do not have the same subject matter on the basis that EU law does not offer equivalent procedural or substantive protections to foreign investors. For example, the tribunal finds that freedom of establishment is not coordinate with protection from expropriation under the BITs.⁴⁶ Therefore, it would be difficult for EC to argue that EU law should prevail under Art. 59(1) of VCLT. The same issue of having the “*same subject matter*” between the and EU law would arise if EC were to argue that Art. 30 of VCLT regarding successive treaty should apply.⁴⁷

If the court were to find the Netherlands-Slovakia BIT and EU law have the same subject matter, EC might be able to raise the argument of priority clauses. Under the Netherlands-Slovakia BIT Art. 3(5) states if the rules of other Agreement treatment are more favorable than of the present Agreement, such rules “*shall prevail over the present Agreement to the extent that is more favorable (emphasis).*” The burden would be on EC to prove that the investor protection of EC law is more favorable.

As raised in the EC-Declaration, if EC were to successfully raise *lex posterior*, and passed the “*same subject matter test*” under Art. 30 (1) of VCLT, since each intra-EU BITs are signed by Member State respectively, Art. 30(3) of VCLT that regulates when parties to the later treaty (EU law) includes all parties to the earlier (respective intra-EU BITs) would apply, and the latter

⁴⁶ *WNC Factoring Ltd. v. Czech Republic*, PCA Case No. 2014-34, Award, 298-305 (Feb. 22, 2017).

⁴⁷ *Slowakische Republik (Slovak Republic) v. Achmea BV*, Court of Justice of the European Union, Judgment, Case C-284/16 (Mar. 6, 2018) (“[T]he tribunal found that there is no incompatibility between the BIT and successive treaties under Article 30 Vienna Convention where an obligation under the BIT can be fulfilled by the host State without violating EU law”)

treaty will have hierarchy over the intra-EU BITs.⁴⁸

Art. 54 (a) of VCLT also allows for unilateral termination by one party if stated and agreed in the BIT drafted by the parties. Since the EC-Declaration is to terminate all Intra-EU BIT and all member-state are in theory under the guidance of EU, and in practice, no objection of these termination has been made. Therefore, the termination of Intra-EU BIT would fall under the mutual termination route of VCLT instead.⁴⁹ EC has been encouraging mutual termination of the intra-EU BITs.⁵⁰

In short conclusion, under the preliminary analysis of Achmea under international law, (1) EU law as constitutional law not treaty law of EU may not invoke EU law as a reason to justify its failure to perform under the Netherlands-Slovakia BIT (VCLT Art. 27); (2) since the EU law and the Netherlands-Slovakia BIT does not have the “*same subject matter*”, EC may not contest successive treaty (VCLT Art. 30) or termination (VCLT Art. 59) of the Netherlands-Slovakia BIT due to factual conclusion of the latter (EU-law), and (3) the same reasoning of subject matter applies to Art. 30(5) for the *lex posterior* argument.

3.4 Other Achmea Issues Raised under International Law

The primary rationale behind EC’s argument of Achmea is that there is a clash of applicable

⁴⁸ VCLT Art. 30(3) (“[T]he earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.”)

⁴⁹ VCLT Art. 54(a) & (b) (“[T]he termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States.”); T. Voon & A.D. Mitchell, *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law*, 31 ISCID REVIEW-FILJ 413 (2016).

⁵⁰ See European Commission, *Commission asks Member States to terminate their intra-EU bilateral investment treaties*, Press Release (18 June 2015); see also Jarrod Hepburn and Luke Eric Peterson, *Stage is Set for Infringement Proceedings over Intra-EU BITs, as Informal Process between European Commission and Three Member-states fail to Resolve EC’s Concerns*, INVESTMENT ARBITRATION REPORTER (June 2015).

law and the EU law should take precedent, for, under the autonomy rule, intra-EU BITs cover the same area of EU law (e.g., expropriation, most favored nation clause), the intra-EU BITs gives tribunal opportunities to rule differently from the EU law and policy, and under the supremacy of EU, this is an area EC does not want to take risk from.⁵¹ Although the *Achmea-CJEU* clearly takes this point of view, the *Achmea-PCA* tribunal initially found that the tribunal actually cannot derive any part of its jurisdiction or authority from EU law, because its jurisdiction is derived from the consent of the parties to the dispute in accordance with the BIT and German law. Thus, EU law is actually operated as between the parties as part of German law as the *lex loci arbitri*. Other awards such as the case of *Vattenfall v. Germany II* have also discussed the clash between EU land intra-EU BITs and found that EU law should be seen as international law because it is rooted in international treaties.⁵²

Another hypothesis is if, under the EC's theory, that EU law precludes arbitration under BITs, does the BIT become invalid? The *Achmea-CJEU* has failed to answer this question. In practice, EC and EU Member States have decided to close down all intra-EU BITs altogether, but before a legitimate termination of the BITS, EC fails to justify of its preclusion of arbitration.

On the matter of whether the *Achmea-CJEU* judgment would have an effect over international commercial arbitration, under the analysis and main argument of EC, it is unlikely. Both CJEU and EC have focused on the violation of EU law for other countries to interpret or

⁵¹ INTERNATIONAL CHALLENGES IN INVESTMENT ARBITRATION (MESUT AKBABA & CIANCARLO CAPURRO), ROUTLEDGE 117-19 (2019); INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVE (FREYA BAETENS ED.) 376-78 (2013)

⁵² *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12 (2018); *European American Investment Bank AG (Austria) v. Slovak Republic*, PCA Case No. 2010-17, Award on Jurisdiction, ¶¶69-73 (Oct. 22, 2012).

apply EU law under the intra-EU BIT, which is between two states. International commercial arbitration is contracted between two private parties, and thus does not have the same authority as of two Member State would have.⁵³ There are several prior cases of intra-EU BITS that concerns the wrestle between EU laws and BITs.⁵⁴

3.5 *Compliance of the Achmea-CJEU Decision to the New York Convention*

Referring to the argument of EC of the need to protect EU autonomy by applying EU law over the intra-EU BITS, shows that EC did not consider the possibility of setting aside the award regarding intra-EU BITS based on the New York Convention to be a secure safeguard of the autonomy of the EU legal system. Although ironically, EC managed to prevent the continuousness of intra-EU BITS because the Federal Court of Germany took the case of Slovakia to set aside the award.⁵⁵ Putting the EC assertion and action aside, the question is whether EC could have alleged the defense of the violation of public policy of the *Achmea* Award under the New York Convention.

Art. 5(1)(d) of the New York Convention provides a justification for the domestic court to refuse to recognize or enforce a foreign arbitral award under its discretion to decide if the arbitral procedure was in accordance with the agreement of parties, or absence of an agreement, the law of the seat of arbitration.⁵⁶ Under investment arbitration, Art. 5(1)(d) of the New York Convention, allows for EU law to be part of the applicable law, in case of dispute, either by

⁵³ Paschalis Paschalidis, *Chapter 14: Challenges under EU Law to the Enforcement of Arbitral Awards under the New York Convention*, in 60 YEARS OF THE NEW YORK CONVENTION: KEY ISSUES AND FUTURE CHALLENGES, KLUWER LAW INTERNATIONAL 225 (2019).

⁵⁴ KRIEBAUM, *supra* note 2.

⁵⁵ PASCHALIDIS, *supra* note 53.

⁵⁶ New York Convention, Art. 5(1)(d).

virtue of express provision or implicitly. Therefore, in the course of determining the applicable law, EC may continue to claim that since the subject matter regards intra-EU BIT, EU law is implicitly agreed to be the applicable law by the parties.⁵⁷ However, it would seem contradictory, for EC to contend that the arbitration provided in the Netherland-Slovakia BIT, expressly agreed by the parties, would violate the implicit application of the EU law. This would be the domestic court's discretion to decide. However, the parties may not allege Art. 5(1)(d) of the New York Convention to allege a failure to correctly apply the law chosen by the parties.

Another defense to request the domestic court to set aside an award is under Art. 5(2)(b) of the New York Convention based on the violation of public policy of the state. This is an argument that is more likely to succeed since the TFEU are fundamental EU constitutional provision of the EU Member States.⁵⁸ The public policy defense may be raised regardless of whether the seat of arbitration is fixed in or outside of EU.⁵⁹

3.6 *The Challenge of Enforcement*

After a long way through the various jurisdiction of tribunal and courts, the case is still not settled. The issue remains in flux. Although *Achmea-CJEU* and the Federal Court of Germany have cut the hope of enforcement of *Achmea* in EU. However, there may be a chance for *Achmea* to enforce the award out-side EU, since EU law does not bind the foreign countries and thus is less likely to follow the line of analysis provided by the *Achmea-CJEU*.⁶⁰ Although, an

⁵⁷ See Energy Charter Treaty, Art. 26(6); *Electrabel SA v. Hungary* (ICSID Case No. ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability ¶4.119-4.124. (Nov. 2012).

⁵⁸ See *Slowakische Republik (Slovak Republic) v. Achmea BV*, Court of Justice of the European Union, Judgment, Case C-284/16 (Mar. 6, 2018).

⁵⁹ PASCHALIDIS, *supra* note 53.

⁶⁰ Marie Stoyanov, *Increased Enforcement Risk in Intra-EU Investment Treaty Arbitration*, ALLEN & OVERY, available at <http://www.allenoverly.com/publications/en-gb/lrrfs/continental%20europe/Pages/Increased->

application to enforce Achmea outside EU is currently unheard of. Another possible option would be for Achmea B.V. to sell its award to third parties for enforcement, but *Achmea* is currently a high-risk case. It would be hard for Achmea B.V. to find a buyer

Intra-EU BIT related arbitration awards beside *Achmea*, on the other hand, have been finding their way in foreign courts. Cases regarding similar *Achmea* clauses in intra-EU BIT are brought to district courts around the world for either preliminary ruling or asserting the court should set aside an award.⁶¹ Such as the *Novenergia v. Spain* case.⁶² Some of the other cases are currently in the District of Columbia in the United States.⁶³

4 Conclusion

The consequence of EC 's decision of going strong on nationalism and destroying all intra-EU BITs may backlash against EU. In the real world, potential investors have halted investment plans in the EU Member States after the *Achmea* case has aroused. Not to mention that existing EU investors are advised to restructure investments through non-EU countries that have BITs with EU Member States in order to maintain investment protection.⁶⁴

In the end, the biggest issue of the *Achmea* series is the dispute between the two main concepts held firmly between the tribunal and the CJEU. The tribunal applying international

enforcement-risk-in-intra-EU-investment-treaty-arbitration.aspx (last visited: May 10, 2019).

⁶¹ Foresight Luxembourg Solar 1 S.A.R.L. et al v. Kingdom of Spain (Currently, as of March 2019 the case is in the S.D.N.Y. court; the claim was brought by Spain to set aside an arbitral award); *Novenergia v. Kingdom of Spain* (U.S. District Court for the District of Columbia, Docket No. 18 Civ.1148) (2018); *Ioan Micula v. Government of Romania* (U.S. District Court for the District of Columbia, Docket No. 17 Civ. 2332) (2019); *Eiser Infrastructrue Limited v. Kingdom of Spain*, (U.S. District Court for the District of Columbia, Docket No.18 Civ. 1686) (2019).

⁶² *Novenergia v. Kingdom of Spain* (U.S. District Court for the District of Columbia, Docket No. 18 Civ .1148) (2018).

⁶³ DRAGIEV, *supra* note 1.

⁶⁴ VOLETERRA FIETTA, *supra* note 87.

law find reasonable believe the intra-EU BIT will not harm the autonomy and supremacy of EU law and without doubt has jurisdiction over the case. This was originally supported by the Federal Court of Germany but was later turned around after *Achmea-CJEU* was rendered. CJEU stands firm that EU law should precede in any circumstances. Therefore, those in the international community who expected a dialogue of the application and relationship of EU law and international law should be disappointed. In sum, this paper's goal is to provide a clearer picture of the clash of the two worlds of the EU and international law. In practice, CJEU decision has more significant impact on other awards and ongoing domestic court cases. However, the tribunal has provided international law analysis and evidence, which the CJEU has failed to answer and justify its statements.

The future of intra-EU BIT was unrolled after EC issued a declaration in early 2019 announcing all Member States have agreed to terminate all intra-EU BIT around the end of 2019. From this paper's analysis, first, cases that have started before the actual date of termination of each BIT, respectively, will still be allowed to be adjudicated. Second, the tribunals and courts of these cases and those that are ongoing before termination will likely be influenced by "encouragement" of EC to set-aside or adjourned because of lack of jurisdiction. Third, intra-EU BITs with sunset clauses (e.g., the Netherland-Slovakia BIT has 15 years) are likely to be terminated together with the BITs at the end of 2019. Fourth, although the *Achmea* series regards only intra-EU BIT, however, it has been affecting similar cases under ICSID. But for

In conclusion of the *Achmea* series of events and other recent intra-EU BIT cases, it is clear that EC has been steering toward nationalism since 2005 when it has actively and publicly encouraged the termination of all intra-EU BIT in several occasion. Yet the EC-Declaration has

stated for the Member State to provide reasonable effort to terminate their intra-EU BITs. Therefore, whether the intra-EU line of the dispute will come to an end in the short run, remains unanswered. Meanwhile, the initiation and development of the international investment court that is supported by the CJEU could take over the investment dispute resolution regime. How the two systems will interact, and which shall prevail can only be proven over time.