The CJEU and the Introduction of International Dispute Settlement Mechanisms within the EU: Is Alternative Dispute Resolution in the EU in safe hands?

Abstract

This article draws upon the jurisprudence of the Court of Justice of the European Union (CJEU) concerning the role of the international dispute settlement mechanisms operating within the EU legal order. The Court has resisted the introduction of such dispute settlement mechanisms, referring to Articles 267 and 344 of the Treaty of the Functioning of the European Union (TFEU) as justifications for its 'judicial monopoly'. The Achmea case in particular allows the Court declaring these dispute settlement mechanisms as contrary to EU law. However, with the Comprehensive Economic Trade Agreement (CETA) Opinion, the Court itself has permitted the CETA Investment Court to be compatible with EU law, within the Comprehensive Economic Trade Agreement (CETA) with Canada. This leads to the possibility that the Court's reasoning should be equally applicable to other potential investment courts. The present article is a doctrinal study; which examined primary sources of EU law namely the Treaties and the CJEU's jurisprudence within international commercial and investment law. It is argued that there are 'winds of change' within the EU legal order as the EU legal order begins to readily adopt such dispute settlement mechanisms. This is visible through the approval of the CETA Investment Court, coexisting with debates on developing a permanent multilateral court within the EU legal order and following Brexit the use of arbitration within the EU and UK trade agreements. However, at the same time these advancements are to be taken with caution because the recent developments within the UK EU trade agreements illustrate that the CJEU may still be keen to protect its 'exclusive jurisdiction' under the Treaties.

Introduction

The CJEU has been very critical of the EU adhering itself to the jurisdiction of international dispute settlement mechanisms. This rigid approach has led the court to abandon the EU's intention to accede to the European Economic Court, the Unified Patent Court and the European Court of Human Rights (ECHR).[1] The 2018 Achmea judgment also provided the CJEU with the platform to declare international dispute settlement mechanisms as contrary to EU law.[2] The main reason for this retaliation by the CJEU was that it deemed itself as the sole jurisdiction to provide the definitive interpretation of EU law. Its justification stemmed from the reliance on Articles 267 and 344 TFEU, the former which respectively establishes the preliminary ruling procedure and the later forbids the Member States 'to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein'. In particular, the Court in Achmea held the preliminary

[1] ECJ, Opinion 1/91 (1991) ECR I-6079, para 46 (re the European Economic Area Court); ECJ, opinion 1/09 (2011) ECR I-1137, para 89 (re the Unified Patent Court); ECJ Opinion 2/13 (2014) EU: C 2014:2454, para 258 (re the European Court of Human Rights).

[2] Slovak Republic v Achmea, (2018) Case C-284-16.

procedure as the institutional backbone for the effectiveness and uniform application of EU law, as it allows the communication between national courts and the CJEU. The Court would not allow this route to be compromised by allowing investors alternative routes of dispute settlement, which did not have the option of utilising the preliminary procedure. The ECHR accession ruling was controversial as it was set as a mandate within Article 6 of the Treaty of the European Union.

The Court's overtly protective claim to the 'exclusive jurisdiction' over the definitive interpretation of EU law has been labelled as 'selfish and fearful'.[3] The fear was that if all international courts showed a similar amount of protection towards their jurisdiction as the CJEU, then this would ultimately destabilise the rule of law, a founding principle of the EU.[4]The CJEU eventually sided with Advocate Bot and accepted the jurisdiction of an investment court within the Comprehensive Economic Trade Agreement (CETA) with Canada, concluding that it does not 'adversely affect the autonomy of the EU legal order'.[5] Furthermore, that the principle of autonomy should be interpreted 'in such a way as to maintain the specific characteristics of EU law but also to ensure the European Union's involvement in the development of international law and of a rules based international legal order.'[6] This leads to questions such as will the CJEU with its enshrined arguments on the autonomous EU legal order now allow other dispute settlement mechanisms to flourish within the EU legal order? Alternatively, will the CETA Opinion provided by the CJEU be an exceptional relaxation of its claims to exclusive jurisdiction? The questions are particularly important as the EU is expanding its international trade relations; in particular, as the EU and UK navigate their future relationship the future structure and activity of the CJEU will always be relevant in the debate.

As well as answering these questions, this article innovates the area of discussion in a threefold manner. First, it has opted for a comprehensive approach rather than previous studies on focusing on the key CJEU cases within international commercial arbitration and international investment arbitration. In doing so, it aims to provide a detailed account of the jurisprudence of the CJEU and its attitude towards the upcoming international dispute mechanisms within the EU and their ability to operate faced with such restrictions. Second, the article has demonstrated that despite the CJEU's resilience to intra EU arbitration the tribunals have not declined jurisdiction. This had led to the author explore the debate concerning the prospects for the use of a new permanent multilateral court as a dispute

[3] Christian, Riffel. *The CETA opinion of the European Court of Justice and its implications-Not that selfish after all*. 22 JOURNAL OF INTERNATIONAL ECONOMIC LAW 3. 503. (2019). Also Jed Ordermatt. Bruno de Witte. 'A selfish Court? The Court of Justice and the Design of International Dispute Settlement Beyond the European Union'. In Marise Cremona and Anne Theis (eds). THE EUROPEAN COURT OF JUSTICE AND EXTERNAL RELAIONS LAW: CONSTITUTIONAL CHALLENGES. Oxford: Hart. 2014.

[4] Art 2 TEU. Also para 72 Case C -72/15 PJSC Rosenet Oil Company v Her Majesty's Treasury and Others (2017) EU: C:2017:236.

[5] Para 161.ECJ, Opinion 1/17 (2019) EU: C: 2019. See also Advocate General Bot Opinion 1/17 (2019) EU: C: 2019. For CETA Agreement see *Comprehensive and Economic and Trade Agreement between Canada, of the One Part and the European Union and its Member States, of the other part*. https://data.consilium.europa.eu/doc/document/ST-10973-2016-INIT/en/pdf

[6]Para 195.*Advocate General Bot Opinion 1/17* (2019) EU: C: 2019.

settlement mechanism, replacing ad hoc tribunals, which will only succeed within the EU legal order if it can guarantee personal integrity, transparent judicial appointment procedures and shorter proceedings. Third, the article contributes new insights by offering an explanation to the use of arbitral tribunals within the Trade Cooperation Agreement (TCA) and the Withdrawal Agreement (WA) with caution.[7] As the author points out that despite Brexit and the claims that the UK would cut its ties with the CJEU. In the long run the CJEU will retain some jurisdiction even after the transition period, again questions the reality and viability of other dispute settlement mechanisms flourishing within the EU legal order. The importance of these queries go beyond substantive EU law. They shall contribute to two areas, the first being the CJEU's ability to shape European integration and the second being the EU's ability to balance the institutional concerns of the CJEU against the EU's need to utilise other international dispute settlement mechanisms in its agreements.

Following a brief discussion on the methodology, the article is divided into three parts: the first part examines the CJEU's jurisprudence with international commercial arbitration and international investment law, highlighting the CJEU resilience of international dispute settlement mechanisms and preference of the national courts for referrals. The second part critically evaluates the CJEU interpretation of autonomy from the Achmea and previous cases to provide the rationale behind the Court protecting its own judicial prerogatives but risking the EU's development as an international actor. The final part then deals with the 'winds of change' within the EU legal order though the approval of the CETA Investment Court by the CJEU; debates on developing a permanent multilateral court within the EU legal order and the use of arbitration within the EU and UK agreements. However, these advancements are to be taken with caution because the recent developments within the UK EU agreements illustrate that the CJEU jurisdiction is as 'firm as ever before'.

The research problem sought to be addressed is the dilemma between the protectionist approach of the CJEU in its role to interpret and apply EU law and the growing use of the increasingly popular international dispute settlement mechanisms within the EU context. In order words an investigation into the legal reasoning and rationale behind the Court's justification for its rigid approach in the acceptance of such settlement mechanisms. Followed by highlighting the rationale behind its more recent subtle approach in allowing such dispute mechanisms legal authority and purpose within the EU legal order. The paper adopts the doctrinal legal research methodology, commonly utilized within the legal research discipline; whereby the research problem will be addressed from the prism of the hierarchical structure of sources of law[8]. Within the discussion, references will be made to the primary sources of

[7] *Trade and Cooperation Agreement Between the European Union and the European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part.* OJ L 444, 31.12.2020. Also, Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union Atomic Energy Community 2019/C 384/01.

[8] William, H., Arthurs. Law and Learning: Report to the Social Sciences and the Humanities Research Council of Canada by the Consultative Group on Research in Law (1983). Dennis, Pearce., Enid, Campbell., & Don Harding, Australian Law Schools: A Discipline Assessment of the Common Wealth Tertiary Education Commission. (1987). Martha, Minrow. Archetypal Legal Scholarship- A Field Guide'. JOURNAL OF LEGAL EDUCATION. 65-69. (2013).

law namely being the Treaty of the European Union (TEU); The Treaty of the Functioning of the European Union (TFEU); the Trade Agreement between the UK and the EU and the Withdrawal Agreement between the EU and UK. The CJEU's jurisprudence will be analysed in great depth via its key judgments in this area to support the legal arguments hypothesized by this paper. In addition, the author has sought to refer to key secondary sources including major publicists to complement the primary sources in evaluating the legal problem sought to be addressed by the paper[9].

(I a)CJEU and International Commercial Arbitration

The EU regime governing the jurisdiction of the courts in civil and commercial matters began with the enforcement of the 'Brussels I' Regulations also known as the Brussels I.[10] The regulations were adopted by the EU to determine which EU Member State had jurisdiction within the given commercial and civil disputes to be decided and with regards, the recognition and enforcement of judgments made in other Member States. The Schlosser Report insisted for a wider interpretation of the term 'arbitration' under Article 1, specifically pointing out those proceedings in which the link to 'arbitration' was mere incident did fall with the scope of the Regulation.[11]This interpretation on the extent on the exclusion of arbitration was examined by the CJEU within the Marc Rich AG v Societa Italiana Impianti case, which concerned a dispute on about the contamination of a cargo of crude oil.[12] The contract stipulated arbitration within London in case of a dispute between the parties. The Defendant subsequently did not cooperate with the appointment of an arbitrator once the Claimant started London arbitration proceedings. The English court made an exparte order for service of the court proceedings initiated by the Claimant for the Defendant to cooperate in relation to the arbitration proceedings. The Defendant applied for the order to be set aside

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[9] Thomas, Dietz, Marius Dotzauer and Edward Cohen. The legitimacy crisis of investor-state arbitration and the new EU investment court system. REVIEW OF INTERNATIONAL POLITICAL ECONOMY 26:4(2019). Marise Cermona,. et al. THE EUROPEAN UNION AND THE INERNATIONAL DISPUTE SETTLEMENT. Bloomsbury. Hart Publishing. London. (2017). Sonsoles Centeno Huera and Nicolaj Kuplewatzky. Achmea, The Autonomy of Union law, Mutual Trust and What Lies Ahead. 4 EUROPEAN PAPERS 1 (2019). Franco Ferrari .THE IMPACT OF EU LAW ON INTERNATIONAL COMMERCIAL ARBITRATION. Juris, New York. (2017). Jens Hillebrand Pohl. Case Comment: Intra-EU investment arbitration after the Achmea case: legal autonomy bounded by mutual trust? 14 EUROPEAN CONSTIUTIONAL LAW REVIEW (4) 767-791 (2018). Erika Szyszczak,. Opinion 1/17: Towards a modern EU approach to investor-state dispute settlement. Briefing Paper; May 2019. UK Trade policy Observatory. Vanessa Thieffry. The Achmea Judgment: an additional stage in the construction of a group of international litigation resolution mechanism? An analysis in the light of French Arbitration law. 3 INTERNATIONAL BUSINESS LAW JOURNAL. 201-16 (2018).

[10] Franco Ferrari .THE IMPACT OF EU LAW ON INTERNATIONAL COMMERCIAL ARBITRATION. Juris, New York. (2017).

[11] Professor Peter Schlosser. *Report on the 1978 Accession Convention to the Brussels Convention on the Association of the Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice*. OJ 1979 C 59/71).

[12] Case C- 190/89 Marc Rich & Co. A.g v Societa Italiana Impianti p.A., [1991] E.C.R I-3855.

which was refused and then on appeal the Court of Appeal referred the matter to the CJEU to determine whether or not Brussels I applied to the proceedings or alternatively the exclusion under Article 1 applied due to the existence of the arbitration agreement. The CJEU held that the exclusion applied if the arbitration was a preliminary issue within the dispute. Hence, the CJEU's restrictive application of Article 1(2) (d) allowed the Regulation to be deployed even where parties have arbitration agreements between them.

Anti-suit injunctions were generally utilised by English courts in support of arbitration. Also as a solution to parallel proceedings by restraining, a party from pursuing or continuing court proceedings brought in breach of an arbitration agreement. Equally, anti-suit injunctions are equitable remedies mostly used as a procedural tool by the courts in order to inhibit parties from pursuing court proceedings involving a breach of a choice of court or arbitration agreement.[13]Before examining their compatibility with Brussels I, it is important to examine their reception in the context of Brussels I. The CJEU within the case of Erich Gasser GmbH v MISAT Srl cited that the principle of 'mutual trust' as the pinnacle of Brussels I.[14]

This principle was further elaborated within the CJEU decision in Turner v Grovit.[15] Here the CJEU had to decide between a court of one Member State doubting the jurisdiction of the court of another Member State, when the question of the latter court's jurisdiction was a matter for it alone. The Court applying the principle of mutual trust established in the Gasser case, banned the use of anti-suit injunctions granted by a court of a Member State in respect of proceedings in another Member States particularly where they are granted to support prospective court proceedings. The CJEU states that:

'The Brussels regime is to be interpreted as precluding the grant of an injunction whereby a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court of another Contracting State, even where that party is acting in bad faith with a view to frustrating the existing proceedings'.[16]

The West Tankers case involved the CJEU applying the principles of mutual trust and effectiveness of EU law.[17] The case involved examining the legality of anti-suit injunction issued by the English court; this was in response to the Italian court proceedings brought against the defendant, which were in breach of the arbitration agreement. The House of Lords referred the matter to the CJEU asking if:

'it is incompatible with Regulation No 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement, even though Article 1(2) (d) of the Regulation excludes arbitration from the scope thereof '.[18]

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[13] Trevor Hartley, '*The Brussels I Regulation and Arbitration'* 63 INTERNATIONAL AND COMPARATIVE LAW QUATERLY 843. (2014).
[14] Case C-116/02, Erich Gasser GmbH v MISAT Srl [2003] E.C.R. I-14693.
[15] Case C-159/02, Turner v Grovit [2004] E.C.R. I-3565.
[16] Ibid Para 31.
[17] AllianZ SpA and Generali Assicurazioni Generali SpA v West Tankers (2009) E.C.R para 19
[18] Ibid para 41.

Advocate General Kokott stressed that anti-suit injunctions undermine the principle of trust and confidence, which is essential to the functioning of the Brussels I regime and the acknowledgment that any court seised itself can determine for itself whether or not it has the jurisdiction to resolve the dispute.[19]In matters of dispute, the AG recognised that national courts would stay proceedings and refer parties to arbitration in compliance with Article II of the New York Convention which all the members are parties. The CJEU also agreed and held that as the validity of the arbitration was only incidental and not the main part of the proceedings hence the proceedings fell within Brussels I. Consequently, the use of anti-suit injunctions 'would amount to stripping the court of the power (Tribunale di Siracusa) to rule on its own jurisdiction'.[20] Such a remedy would interfere with the trust between the Member States in the Brussels I regime. The CJEU declared that the anti-suit injunction would deny the claimant access to judicial protection provided under Article 5(3) Brussels I Regulation and thereby impairing the effectiveness of EU law. The principle of effectiveness is utilised by the CJEU to interpret EU law. The principle of the 'effectiveness of EU' law requires national courts to ensure that EU rights and obligations are protected via adequate remedies. This is embedded within Article 19(1) of TEU, which states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.[21] Hence, the CJEU applied the principle of effectiveness of EU law in the West Tankers case to allow access of the parties to the Italian court for a remedy and disallowed the anti-suit injunction. As the effectiveness of EU law may have been compromised if the parties in the proceedings did not have access to the Italian courts under the Brussels I Regulation to then establish whether or not the arbitration agreement valid.[22]

The Tankers decision faced many disapprovals from the supporters of international commercial arbitration. One of the arguments raised was that the effectiveness and validity of an arbitration agreement would always be viewed as a preliminary issue therefore subjected to the Brussels Regulation.[23] Following the broadening of the EU's competences, the Brussels I Regulation was replaced by the Brussels I Recast Regulation, which came in application from 2015. The exclusion was maintained and Recital 12 was added to clarify the scope of the exclusion.[24]

The CJEU was called upon by a Member State court to certify if the scope of the exclusion of arbitration was affected by the newly added Brussels Recast recital. In the Gazprom case in summary, Gazprom sold gas to a Lithuanian company (LD) and consequently became a shareholder along with the Lithuanian Ministry of Energy. The shareholders agreement contained an arbitration clause. A dispute arose and the Ministry started proceedings in the national court. However, Gazprom initiated proceedings in the arbitral tribunal and the tribunal awarded an order that the Ministry withdraw the claim from the court.

[19] Opinion of Advocate General Kokott in West Tankers, EU: C 2008, para 58.
[20] West Tankers Inc v Allianz SpA (2012) EWHC 854.
[21]Page 145. Trevor Hartley see supra note 13.
[22] Allianz SpA, supra note 21 para 29-31.
[23] Alexander Layton. Arbitration and Anti-suit injunctions under EU law. (eds) Franco Ferrari. THE IMPACT OF EU LAW ON INTERNATIONAL COMMERCIAL ARBITRATION. Juris (2017).

The national court upheld its jurisdiction and held that under Lithuanian law the matters of the complaint cannot be decided under arbitration. Consequently, Gazprom appealed this decision in the Court of Appeal and for the court to uphold the tribunal's decision in accordance to the New York Convention. The Court of Appeal dismissed the appeal and Gazprom then appealed to the Supreme Court. The Supreme Court then referred the matter to the CJEU. The Court had to decide whether or not a national court has to interpret Regulation 44/2001 in such a way that it will ultimately refuse to enforce or recognise an arbitral award.

The CJEU confirmed its judgment in West Tankers, as it stated that any injunction that restrained a party from access to the court would not be compatible with the Brussels Regulation. However, the Court provided a qualified response for an instance when an anti-suit injunction is made by an arbitral tribunal. It argued that in such circumstances if the national court was restricted from an anti-suit injunction from examining its own jurisdiction then this was due to that particular Member State's own procedural law and the New York Convention, which are outside the ambit of the Brussels Regulation.[25] Hence, the Brussels Regime does stop the Member State from enforcing arbitral award stopping a party to bring proceedings before the court of that Member State.

The Opinion of AG Wathelet was highly critical of the CJEU's West Tankers decision in the Gazprom case. AG Wathelet viewed Recital 12(2) to remove the validity of the arbitration agreements from the Brussels Recast, including incidental matters. This interpretation would mean that anti-suit injunctions would not interfere with the effectiveness of EU law.[26]

AG further claimed that the CJEU within the West Tankers unduly placed restrictions on arbitration by its stringent narrow interpretation of the Brussels Regulation. The AG stated:

'Although arbitration like the status of natural persons was excluded from the scope of the Brussels I Regulation, the Court held that the English courts could not apply their national law to its full extent and issue anti-suit injunctions in support of arbitration. In doing so, the Court restricted the extent to which arbitration is excluded from the scope of that regulation'.[27]

The reality is that the West Tanker's decision remains unaffected by Recital 12. In its first paragraph, Recital 12 confirms that the Brussels I does not apply to arbitration. However, it also acknowledges that West Tanker type proceedings may fall under the scope of Brussels I. This is because the Recital states that the despite the parties being in an arbitration agreement, the courts can decide on the fate of the arbitration agreement in accordance to their national law. Equally, Recital 12 confirms that Member State courts are not obliged to recognise or reinforce court judgments, which determine the validity of the arbitration agreement. Hence, it can be argued that even Recital 12 could not challenge the CJEU's judicial monopoly and

[25] Gazprom OAO v Lietuvos Respublika, 2015 E.C.R. I-316. Case C-536/13. Paras 32,33,38,42.
[26] Opinion of Advocate General Wathelet in Case C536/13 Gazprom, EU: 2014:2414, para 125,127.
[27] Ibid. Para 103.

its portrayal of the significant role of Member State national courts in contrast to the role of arbitral tribunals.

(I)(b)CJEU and Investment Arbitration

Bilateral Investment Treaties (BITs) are agreements that establish the terms and conditions for private investment by nationals and companies for private investment by nationals and companies of one state in another state. The purpose of a BIT agreement is to ensure that the host state provides certain guarantees to the investor of the contracting state. These guarantees include fair and equitable treatment; the most favoured nation principle; the national treatment principle; direct and indirect compensation in the event of expropriation. Many BITs contain alternative dispute resolution provisions allowing the investor to utilise international arbitration either through the International Centre for the Settlement of Investment Disputes (ISCID), or under any other international treaties rather than utilising the courts of the host states.

Many EU Member States have signed BITs between them in particular, for which at the time of signing the BIT at least one party between them was not an EU Member State. These BITs and the alternative dispute mechanisms provided under them have functioned successfully. However, increasingly there have been a number of investor state disputes between the Member States. These intra EU BITs have resulted in the CJEU having to consider the impact of dispute resolution mechanisms against the autonomy of the EU law. This led to the CJEU's examination of on one hand the potential conflicts between the Member States duty to establish the supremacy of EU law and on the other hand the Member States international commitments predating EU law.

The EU's stance on intra-EU BITs was evident in the Directorate General for Internal Policies document, where it states that investment deals seem to cover matters, which are already under the remit of EU law such as the free movement of capital.[28] Hence, there are conflicts between investment law and EU law in particular in particular in breach with Article 18 TFEU. As there is potential for discrimination to exist between the preferential treatments provided to the foreign EU investors, which would not be the same as the ones provided within EU law. The position of the EU institutions with regards the compatibility of intra EU BITs with EU law was discussed within the cases of Micula V Romania and Slovakia v Achmea.[29]

In the Micula v Romania case, the Micula brothers who were investors in Romania brought an action in the ICSID Tribunal against Romania for breach of the terms of the Romanian-Swedish BIT. At the time of Romania's Accession to the EU, Romania had to abandon certain incentives as they violated EU state aid rules. The Commission joined the proceedings

[28] Legal Instruments and Practice of Arbitration in the EU. Study for the Directorate General for Internal Policies. Http: //www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pdf. (Accessed 18/8/2021)

[29] IOAN MICULA, VIOREL MICULA, S. C. EUROPEAN FOOD S.A., SC STARMILL. S.R.L. AND S.C. MULTIPACK S.R.L. CLAIMANTS V ROMANIA RESPONDENT ICSID Case No ARB/05/20, dated 11 December 2013 is available at http://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf. ECJ 20 April 2018, Case C-284/16, Slovak Republic v Achmea, EU: C: 2018:158.

as amicus curaie and claimed that the incentives in question breached EU state aid rules. Also that the reinstatement of these incentives would result in unlawful state aid. The Arbitral Tribunal in December 2013 held that by revoking these incentives Romania 'violated the Claimants" legitimate expectations with respect to these incentives being available until April 2009. The Tribunal then went on to say that with the exception of maintaining the investors' obligations under the existing law after revocation of the relevant incentives, 'Romania's repeal of the incentives was a reasonable action in pursuit of a rational policy'. Despite these considerations, the Tribunal concluded that Romania's actions were unfair and inequitable.[30] Micula initiated proceedings within Romania for the enforcement of the award. The Romanian Courts ordered for the execution of the awards as the executor demanded for the Romanian Ministry of Finance's accounts to be seized. The Commission then in its 2015 decision again declared that the compensation awarded by the Tribunal would be would be state aid under s107 (1) of the Treaty which is incompatible with the Treaty. Romania was ordered by the Commission to recoup any monies (with interest) paid to Micula.[31]The Commission confirmed that the incentives would still be viewed as state aid even though the aid came through the payment of the compensation awarded by the tribunal.

The Commission asserted that 'In the case of Intra-EU BITs, the Commission takes the view that such agreements are contrary to Union law, incompatible with provisions of the Union Treaties and should there be considered as invalid'.[32]The Commission further stated that 'where giving effect to an intra-EU treaty by a Member State would frustrate the application of Union law that Member State must uphold Union law since Union primary law such as Article 107 and 108 of the Treaty, takes precedence over that Member State's international obligations'.[33] Consequently, the Commission found that the compensation paid by Romania, which was made in order to enforce the ISCID award was incompatible with State aid. Hence, Romania was ordered by the Commission to recover the payments. The Micula brothers did appeal the decision; however, the proceedings were subsequently discontinued.[34]

In March 2018 the CJEU through the Slovak Republic v Achmea case provided its judgment on the compatibility of international arbitration and EU law within the context intra-EU BITs. In a nutshell, the Court ruled that if an arbitral tribunal is called upon to resolve a dispute involving EU law, the tribunal decision needs to be subject to review by a court of the Member State in order for the national court to if needed refer matters of EU law to the CJEU for a preliminary reference ruling.

The case facts involved a dispute between a Dutch insurer Achmea BV and Slovakia. In 2004, the Slovakian government had liberalised its sickness insurance market, this allowed

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[30] IOAN MICULA, VIOREL MICULA, S. C. EUROPEAN FOOD S.A., SC STARMILL. S.R.L. AND S.C. MULTIPACK S.R.L. CLAIMANTS V ROMANIA RESPONDENT ICSID Case No ARB/05/20, dated 11 December 2013 is available at http://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf. ECJ 20 April 2018,

[31] See Articles 1-4. Commission Decision (EU) 2015/1470 of 30 March 2015 on State aid SA.38517 (2014/c) (ex 2014/NN) implemented by Romania – Arbitral award Micula v Romania of 11 December 2013 (notified under document C (2015) 2112).

[32] Ibid Para 128 Commission Decision.

[33]Ibid Para 104 Commission Decision.

[34] Order of the President of the Fourth Chamber of the General Court dated 29/2/2016 in Case T – 646/14. http:curia.europa.eu/juris/document/document.jfs?docid=174864&doclang=en.

Achmea to provide sickness insurance within Slovakia. However in due course Slovakia narrowed its market liberalisation rules, by enforcing a temporary ban on the generation of profits accrued from private sickness insurance enterprises. Achemea found this ban to breach the BIT agreement between Slovakia and the Netherlands. Based on the BIT dispute settlement resolution clause, Achema brought proceedings against Slovakia. The tribunal chose Germany as the seat of arbitration with German law governing the arbitration proceedings.

Slovakia argued that the tribunal had no jurisdiction, as the dispute settlement clause was incompatible with EU law. Slovakia's jurisdictional claims were defeated as the tribunal both in its interlocutory and final reward ordered Slovakia to pay damages. Slovakia brought proceedings within the German Court to set aside the arbitral award claiming that it the enforcement of the award would be contrary to public policy. Unsuccessful at first the claim was then proceeded by Achmea in Germany's highest court. Slovakia argued that the dispute settlement clause was incompatible with the following:

Article 18(1) TFEU, which prohibits discrimination on grounds of nationality;

Article 267 TFEU, which allows for preliminary rulings by the CJEU on questions concerning EU law, these matters are referred to the Court by 'courts and tribunals';

Article 344 TFEU, which restricts Member States from utilising any dispute resolution mechanism for the interpretation of EU law other than those, which are provided by the EU treaties.

Advocate General (AG) Wathelet provided support to arbitral tribunals through his opinion provided in 2017.[35] The AG asserted that investor-state disputes did not fall within the ambit of Article 344 TFEU. As he stated:

'It is clear from the Court's case law that disputes between Member States and between Member States and the Union come under Article 344 TFEU. On the other hand, disputes between individuals do not even if the court called upon to settle them is led to take EU law into account or to apply it'.[36]

AG Wathelet argued that the dispute at stake was not related to the interpretation or the application of the EU treaties, rather it was concerned with the BIT. The scope of the BIT is wider as it offers greater protection to investments, without being incompatible with EU treaties. Hence, 'a dispute between a Netherlands investor and the Slovak Republic falling under the BIT is not a dispute concerning the interpretation or application of the EU and TFEU Treaties'.[37]In addition, as national courts can review the arbitration award a dispute settlement clause cannot itself undermine the role of the CJEU as:

[35] Opinion of AG Wathelet, ECJ 19 September 2017. http://curia.europa.eu/juris/document/document.jsf;jsessionid=440D2F8439989EA741E9919B1F93CD24?text=&docid=194583&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=1139837.
[36] Ibid para 146.
[37] Ibid para 228.

‘it is for those national courts and tribunals to ascertain whether it is necessary for them to make a reference to the Court under Article 267 TFEU in order to obtain an interpretation or assessment of the validity of provisions of EU law which they may need to apply when reviewing an arbitration award’.[38]

The Advocate contended that the arbitral tribunal did confirm with the Article 267 TFEU criteria for a court or tribunal. The Advocate based his reasoning on the fact that he regarded the tribunal to be ‘established by law’, a permanent arbitral institution and satisfied the compulsory jurisdiction criterion.[39]

After assessment of the dispute settlement clause, the AG asserted that although ‘Article 18 TFEU requires that the persons in a situation governed by (EU) law to be governed be placed on a completely equal footing with nationals of the Member State’. However, there is no discrimination when a Member State may choose not to provide the nationals of a third Member State the treatment it provides to Member States nationals under the BIT.[40] Essentially the dispute settlement clause was part of the BIT, and cannot be abandoned.

The CJEU in its judgment distinguished between commercial and investment arbitration. Namely, that commercial arbitration is compatible with EU law as long as the awards are subject to limited review within national courts. This allows for opportunities for EU provisions to be examined and interpreted during the course of the reviews, also providing an opportunity for the use of preliminary reference.[41] In contrast, the Intra-EU BIT in question was not an international investment treaty concluded by the EU. Therefore, it is not compatible with the EU, as its dispute settlement clause does not adhere to the principle of mutual trust between Member States.[42]

The CJEU began its judgment outlining the autonomy of EU law, namely that:

‘EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually independent legal relations binding the EU and its Member States’.[43]

[38] Ibid para 240
[39] Ibid paras 96,107,119.
[40] Ibid para 72, 75, 79.
[41] Ibid para 54 .Eco Swiss China Time Ltd v Benetton International NV. Case 126/97. It was held in this case that Article 85 EC was vital to the operation of the internal market. The content of this article would be deemed to be a matter of public policy with the terms of the New York Convention. EU law required any issues relating to Article 85 EC to be subject to the examination of national courts in the consideration of Arbitral awards. An arbitral award should be annulled by a national court if it is breach of Article 85 EC.
[42] Ibid para 58.
[43] Slovak Republic v Achmea ECLI: EU: C; 2018:158. Para 33.

In the above statement, the Court has reiterated the instrumental principle of 'an autonomous EU legal order', which it developed within the historic Van Gend and Costa judgments.[44] The concept of 'autonomy' was further advanced to reinforce the principles of direct effect and the supremacy of EU law. Lenk then extends the concept of autonomy in to two dimensions.[45] The first dimension looks at the CJEU presenting the autonomous claim, which prohibits international law from having any impact on EU law; EU law is a 'self-referential' system. In the second dimension the CJEU broadens 'autonomy' to include its institutional structures and prerogatives. This dimension results in protecting the institutional dimensions of the EU legal order from international law.

The Court emphasised that under Article 2 TEU Member States share common values and an understanding of *mutual trust* between them. Under Article 19 TEU the Member States, the national courts and the Court have the duty to warrant the application of EU law. The national courts and the Court are intertwined through judicial dialogue via the Article 267 TFEU preliminary ruling procedure to ensure uniform interpretation of EU law.[46]The Court then proceeded to determine whether or not the dispute resolution provision of the BIT was in contravention of Article 267 TFEU and Article 344 TFEU.

In contrast to the Advocate's opinion, the Court ruled that the proceedings conducted within the tribunal did relate to the interpretation or application of EU and in particular, the freedoms provided through the single market. Therefore, in theory the tribunal maybe called upon to interpret and apply EU law.[47]The Court seemed to apply the literal interpretation in reading Article 344 TFEU to mean that it applied to all disputes including those between Member State and individuals (i.e. investor-state disputes).[48]The Member State by accepting the jurisdiction of the tribunal it had acknowledged its jurisdiction in areas that may intersect with EU law, even though the role of the tribunal was to rule on disputes relating to the BIT.

In its consideration on whether or not the tribunal was a court or tribunal for the purposes of Article 267 TFEU preliminary reference procedures, the Court affirmed that the tribunal was not part of the EU judicial system. The tribunal did not form part of the Slovak or Dutch domestic law. In fact, it is the 'exceptional nature of the tribunal's jurisdiction', which makes it a lucrative choice for the parties.[49] The power of the arbitrator to decide its jurisdiction makes it unique and therefore excluded from the Brussels I Regulation. Arbitrators may be able to issue anti-suit injunctions to allow arbitral awards to be enforced. In this case if the tribunal were perceived as a court of the Member State this in turn would constrain the

[44] Case 26/62 Van Gend en Loos, 12. Page 39. Case 6/64, Flaminio Costa v. ENEL., 594.
[45] Page 40.Hennes Lenk. *Investment Arbitration under EU investment agreements: is there a role for an autonomous EU legal order?* Working Paper: January 2016. Research gate. https://www.researchgate.net/publication/299489013_Investment_arbitration_under_EU_investment_agreements_is_there_a_role_for_an_autonomous_EU_legal_order. (Accessed 6/08/2021).
[46] Ibid para 35, 36,37.
[47] Ibid para 42.
[48] Page 776. Jens Hillebrand Pohl. Case Comment: Intra-EU investment arbitration after the Achmea case: legal autonomy bounded by mutual trust? 14 EUROPEAN CONSTIUTIONAL LAW REVIEW (4) 767-791 (2018).
[49] Ibid para 45.

autonomy of the tribunal, an essential feature of the dispute settlement mechanism.[50] Hence, the tribunal could not make an Article 267 TFEU preliminary reference to the CJEU. The Court also pointed out that although in this scenario the award could be subjected to the review of a Member State and then that Member State court may request for a preliminary hearing. This particular procedure of a potential review of an award may be limited by national law. Hence, ultimately the dispute settlement provision could not secure the full effectiveness of EU law. Subsequently, it is recommended that all m/s national laws should allow national courts to review the arbitral awards to overcome this problem in the near future.

To sum up, the CJEU within its notable international commercial arbitration cases has favoured the jurisdiction of the national court rather than the originally chosen arbitral tribunal between the parties. Its reason for this hostility lies with the fact that if a national court were to award an anti suit injunction (in essence to allow the parties to revert to the arbitral tribunal rather than rely on a national court); this would be in breach of the principle of mutual trust and confidence between the Member States. For investment arbitration matters as highlighted in Achmea, the Court has then further relied on the principle of autonomy and mutual trust and confidence to protect its jurisdiction. It makes a clear distinction between the role of an arbitral tribunal and national court. It emphasizes that those tribunals do not have access to the CJEU via the Article 267 TFEU preliminary procedure. Hence, in essence they will not have the legal base to interpret and adjudicate on the validity of EU law. Rather such matters are best placed within the jurisdiction of the Member State national courts, which have unrestricted access to the CJEU if they require interpretation of EU law.

(II) Court v Tribunal battle for autonomy; autonomy and more autonomy

It is contended that the CJEU's interpretation of autonomy from Achmea and previous cases has evolved in to the Court protecting its own judicial prerogatives, restricting the development of the EU as an international actor. This reasoning by the Court may have negative implications on EU investment agreements as the EU is expanding its external competences via trade agreements such as the CETA Agreement with Canada. The CETA contains an international dispute settlement mechanism, which is based upon arbitration discussed later within this paper.

The Mox Plant case demonstrates the CJEU's reference to the principle of autonomy in relation in international courts and tribunals.[51]In the aforementioned case, Ireland brought arbitral proceedings against the UK under the United Nation Convention on the Law of the Sea (UNCLOS) for reprocessing plutonium within the Mox Plant. The UNCOS tribunal stayed the proceedings permitting the parties to access the Court to establish if it had jurisdiction given the impact of EU environmental legislation and EURATOM. The CJEU concluded that the Article 344 TFEU prevented the Member States from initiating

[50] Vanessa Thieffry. The Achmea Judgment: an additional stage in the construction of a group of international litigation resolution mechanism? An analysis in the light of French Arbitration law. 3 INTERNATIONAL BUSINESS LAW JOURNAL. 201-16 (2018).

[51] Case c-459/03, Commission v Ireland (MOX plant), ECR I-4657 (2006).

proceedings before any court or tribunal if the matter is dispute fell within exclusive EU competence.[52] A wider interpretation of the MOX Plant and Achmea would suggest that Article 344 TFEU would restrict the Member States from placing their disputes to any other judicial body other than the CJEU if the matter was a matter of exclusive EU competence.

The previous two European Economic Area (EEA) opinions of the CJEU highlight the Court's commitment to preserve the integrity of the EU, although the CJEU approved the second EEA draft agreement, which restricted the jurisdiction of the EEA Court to encompass EFTA countries and held binding the CJEU's preliminary rulings.[53]

In Opinion 1/91 the CJEU evaluated the draft agreement establishing the EEA, argued that the draft agreement was going to negatively impact 'the autonomy of the (EU) legal order'.[54] The EEA agreement proposed for an EEA Court, which would provide jurisdiction on matters related to the EEA, was seen by CJEU to restrain its internal application of the Treaty.[55] Here the CJEU protected the integrity of EU law externally by excluding international courts and tribunals from interpreting and applying EU law.

The CJEU was again called upon to deliver its opinion on the agreement establishing the European Common Aviation Area (ECAA). The ECAA did not establish a judicial court but aimed to form a committee that would interpret the agreement.[56]The Court acknowledged that to confirm with the principle of autonomy the international court or tribunal must comply with two conditions. Firstly, the international tribunal cannot bind the EU and its institutions to a particular interpretation of EU law. Secondly, it cannot undermine the powers allocated to the EU institutions under the EU treaties.[57]This most evidently would include the CJEU's exclusive right to the interpretation of the allocation of competences.

The Court in Opinion 1/09 was then confronted with the challenge of determining whether the European Patents Court (EPCt) was compatible with the EU legal order.[58] The CJEU contended that the EPCt would take over the national courts duties interpret EU patents law, as it 'would deprive those courts of their task, as 'ordinary' courts within the European Union legal order, to implement European Union law and thereby of the power provided for in Article 267'.[59]The Court seemed to advance the principle of autonomy by extension of the definition of EU institutions to cover domestic courts.

In Opinion 2/13 the CJEU rejected the draft accession agreement of the EU to the ECHR. The Court declined the draft agreement's proposal for it to be presented with preliminary references concerning only the interpretation of EU primary law. In such circumstances, the Court stated 'there would be most certainly be a breach of the principle that the Court of

[52] Ibid para 126-127.
[53] Opinion 1/91, Draft Agreement between the Community, on the one hand and the countries of the European Free Trade Association, ECR, I-06079 (1991). Opinion 1/92, Amended Draft EEA Agreement, ECR I-02821 (1992).
[54] Opinion 1/91, para 35.
[55] Ibid para 41-46.
[56] Opinion 1/100, European Common Aviation Area, ECR I-3493 (2002).
[57] Ibid para 12, 16 21.
[58] Opinion 1/09, European Patents Court, ECR I-1137, (2011).
[59] Ibid para 80.

Justice has exclusive jurisdiction over the definitive interpretation of EU law'.[60] The Court further affirmed that the principle of autonomy also extended to the requirement of the CJEU's earlier engagement to ensure that the international agreement was compatible with the EU Treaties. The Court declared that 'the necessity for the prior involvement of the Court of Justice in a case… in which EU law is at issue satisfies the requirement that the competences of the EU and the powers of its institutions, notably the Court of Justice be preserved'.[61]

The Court's reasoning in all the above cases demonstrates its deliberate shift to the focus of protecting institutional prerogatives rather than the preserving the integrity of law. The recent judgments including Achmea underline the institutional facets of autonomy, by protecting the CJEU's powers to interpret EU law via the national courts. This rationale also suggests that the principle of autonomy does not assume that the international court or tribunal would have express authority to interpret EU if its judicial activity manages to evade the judicial dialogue between the Court and the national courts.[62]

The Court in Achmea was criticised for bolstering the outdated exclusivist and expansionist concept of the autonomy of the EU as critics point out that international law does not allow for hierarchy between international law.[63]Similarly, it is argued that the scope of the BIT within Achmea is wider than the EU Treaties as it covers the state actions and oversights in relation to the investor and his investment.[64]The Court's ruling is considered as outdated and 'pure utopia' as the EU is constantly engaging with international bodies, it is not feasible for EU law to be sheltered from external bodies. Consequently, on many occasions the international bodies will have to interpret EU law for themselves.

Achmea has caused a considerable stir within the EU as it is depicted to not only provide a judgment on foreign investment or on the dispute settlement mechanisms between two or more Member States. Rather it highlights the constitutional objectives pursued by the Court. Namely, that the foundations of EU law are preserved through the thorough protection of the EU judicial system via the preliminary hearing process. The Court required that for at least the interpretation of EU law arbitral awards should be subject to full review by the host state domestic court. This was justified by the Court's need to protect EU citizen rights alongside mutual trust. As 'Article 8 of the BIT is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU'.[65] Critics indicate that Achmea could not have been decided differently as 'the principles of autonomy and mutual trust prevent Member States from offering- and

[60] Ibid para 246.
[61] Ibid para 237.
[62] Mark Burgstaller Dispute settlement in EU International Investment Agreements with Third States: Three Salient Problems, 15 The Journal of World Investment and Trade. (3-4). 551, 562 (2014).
[63] Segolene Barbou des Places et al. Achmea between the orthodoxy of the Court of Justice and its multi-faceted implications: An introduction. 4 European papers 1 pp7-17. (2019) www.europeanpapers.eu.
[64] Ibid page 11
[65] Achmea para 58

EU citizens from accepting- a system of dispute resolution outside the Treaties when EU law is both the means and the end in the life cycle of intra-EU investment'.[66]

The intense support of autonomy of the EU legal order by the Court in Achmea led to twenty-two Member States to sign declarations in January 2019.[67]The Declaration bound the Member States to declare all investor-state arbitration clauses between Member States to be contrary to EU law and therefore invalid.[68] Consequently, on the 24th October 2019 the Commission has announced that the EU Member States had agreed in a plurilateral treaty to terminate their intra-EU bilateral investments treaties (BITs). This treaty was signed and ratified by the EU Member States on 5th May 2020 and came into force on 29th August 2020.[69]

In contrast the tribunals have not declined jurisdiction on the basis that Member States to the EU never had the competence to consent to intra-EU arbitration. This is despite the agreement among the arbitral tribunals established under BITs and the ECT that EU law will be applied between an investor from one Member State and another Member State.[70] Rather within the UP and CD Holding case the tribunal held that 'in the present award, the tribunal does not consider that a detailed discussion of the substance of Achmea is required, because the present case differs in determinative aspects from the case in Achmea'.[71] The tribunal argued this on the basis that the UP and CD Holding v Hungary was bound by the ICSID Convention. The validity of the ICSID Convention had not been questioned following Achmea. This reasoning also held in Marfin v Cyprus (Hanotiau, Edward, Price; BIT, ICSID), in which it was acclaimed that the tribunal's jurisdiction comprised of the Treaty and the ICSID Convention.[72]As Article 25 paragraph 1 of the ICSID Convention extends the jurisdiction of the tribunal to any dispute directly arising out of an investment, in addition the parties have provided their written consent to submit to the Centre.

The tribunal in the Masdar v Spain and Vattenfall v Germany cases found the Achmea case limited to the BIT between the Netherlands and Slovakia and not include the ECT.[73]The Masdar case in particular approved the Advocate General's opinion in Achmea. Whereas the tribunal in Vattenfall seemed to disregard the primacy of EU law, as by limiting their

[66] Page 68. Sonsoles Centeno Huera and Nicolaj Kuplewatzky. Achmea, The Autonomy of Union law, Mutual Trust and What Lies Ahead. 4 European Papers 1 (2019).
[67] Declaration of the Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union, 15 January 2019 (Declaration of Twenty-Two Member States), pp1-2.
[68] Ibid page 3-4.
[69] Agreement for the Termination of Bilateral Investment Treaties Between the Member States of The European Union. https://ec.europa.eu/info/publication/200505-bilateral-investment-treaties-agreement_en accessed on 18/2/2021.
[70] Commission Decision C(2018) 4303 final of 29 June 2018 on intervention as a non-disputing party in investor-state dispute settlements between an investor from one Member State and another Member State based on BITs concluded between Member States or ECT.
[71] ICSID award of 9 October 2018 case no. ARB/13/35, UP and CD Holdings V Hungary. Para 252.
[72] ICSID award of 26 July 2018 case no ARB/13/27
[73] ICSID award of 16 May 2018 case no ARB/14/1/1, Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain. VattenFall V Germany case no ARB/12/12.

freedom of action in international law through the EU legal order the Member states cannot rely on conflict rule provided through international law (i.e. Article 16 ECT).

To sum up, the CJEU has rigorously relied on the principle of autonomy to protect its judicial prerogatives. Furthermore, close examination of Achmea highlights that the Court did not want to limit its ruling for bilateral treaties between Member States rather the Court referred to 'a provision in an international agreement concluded between Member States'.[74] Subsequently, Achmea acknowledges Article 267 and 344 TFEU create an exclusive territory for jurisdiction for dispute resolution between the Member States, and the Court was not bound by the reasoning provided by the Advocate General. It seems as the tribunal have failed to take in to account the certainty of EU law and the obligations that it creates for the Member States. As consistently they seem to retain jurisdiction on BIT related disputes. The only hope is for the tribunals to utilise an EU compatible approach and apply Achmea.

III) Finally, ICS /CETA/Opinion 1/17/MIC/ WA/TCA: Winds of change or back in the same direction?

It is contested that from its clingy policy in Achmea the Court posed the risk of portraying the EU as demanding and mistrusting of other legal regimes of investment protection. This may not accommodate with the EU's expanding international trade relations, as these many of these trade agreements provide for investor-state dispute settlement provisions. The Lisbon Treaty itself provides exclusive direct investment. Thus, the EU makes use of the arbitral tribunal as a dispute settlement mechanism within the Trade and Cooperation Agreement (TCA), which has been agreed between the EU and UK. Furthermore, shifting towards innovation the EU has opted for Investment Court Systems (ICS) in the Free Trade Agreements with Canada (CETA), Singapore (EUSFTA) and Vietnam (EUVFTA).

The new set up of the ICS is designed to address the lack of legitimacy, independence and public contention.[75] The institutional design for the appointment of the judges is similar to established international dispute settlement bodies. The permeant judges are appointed by contracting states for a fixed term period, with the possibility of reappointment if needed.[76] The appointment and fixed tenure of the judges will allow enhanced neutrality of the new ICS through mitigating the original pro-investor bias, which existed through adjudicators employed by the private companies. The code of conduct for Judges within the new Free Trade Agreements will ensure that the judges will not be able to act lawyers for any of the parties, as they will need to disclose their past and present activities that could affect the

[74] Achmea para 60.

[75] Thomas, Dietz, Marius Dotzauer and Edward Cohen. The legitimacy crisis of investor-state arbitration and the new EU investment court system. REVIEW OF INTERNATIONAL POLITICAL ECONOMY 26:4(2019).

[76] CETA art 8.27(1), 8.27(5),

exercise of their duties.[77] This will ensure that the ICS favour public law trained judges rather an international arbitration system containing specialist commercial lawyers.

In an attempt to provide transparency, the ICS within CETA has adopted the 2014 (United Nations Commission on International Trade) UNCITRAL Rules on Transparency.[78]The CETA provisions in sync with the UNCITRAL Rules require the proceedings to be in public, open to third party submissions and make available documents and decisions to the public. Notwithstanding the changes within the EU model have brought the ICS in alignment with the UNCITRAL Rules, the EU may have taken further steps to overcome the negative public perception. This may include publishing the names of the judicial panel on the EU website; this would overtime lead to a useful database of current and historical appointments. Secondly, even though the Judges wages are fixed they can receive further remuneration hence the EU could have charged the judiciary with penalties for any unjustified delays in submitting awards unless the judicial panels could highlight that the delays were out of the control of the judicial panel or due to exceptional circumstances. For instance, for awards submitted for scrutiny up to seven months after the last substantive hearing or written submission the court fees would be reduced by 5 to 10%. Furthermore, for awards submitted after 10 months after a substantive hearing or written submission would amount to the court fees reduced by 10-20% and any delays after that would result in fixed penalty of 25%. At the same time, the ICS could increase the fees of the judicial panel if the case dealt with the expeditious conduct of the judicial panel.

The ICS also provides an appeal bodies to overcome the legitimacy concerns of the old investor-state dispute settlement systems. In the CETA tribunal the Appellate tribunal would be appointed by the CETA Joint Committee and can reverse, modify or uphold the decision of the tribunal. The problem here would be that consistent case law would stem from within this contractual relationship. Any new investment protection regime would have its own appeal body and utilise its own body of case law leading to inconsistencies within investment case law. Therefore, there is a need for the EU to develop multilateral appellate body that would have the legal standing to global consistency of the law.

Notwithstanding, in 2016 the European Commission through its Recommendation introduced the concept of a Multilateral Investment Court (MIC).[79] The aim was to have a multilateral court that would adjudicate on investment disputes by all the bilateral agreements rather than a separate bilateral investment court operating for each Free Trade Agreement. Subsequently the Commission is working on a multilateral level to gain support for MIC.[80] It has submitted

[77] Proposal for Council Decision on the position to be taken on behalf of the European Union in the Committee on Services and Investment established under the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part of the other part as regards the adoption of a code of conduct for Members of the Tribunal, the Appellate Tribunal and mediators. COM(2019) 459 final.

[78] CETA art 8.36.

[79] Recommendation for a COUNCIL DECISION authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes COM/2017/0493 final.

[80] http://trade.ec.europa.eu/doclib/press/index.cfm?id=2070

documentation named 'Establishing a standing mechanism for the settlement of international disputes' to the UNCITRAL Working Group for the reform of investor-state dispute settlement mechanisms, which set out the EU's position in order of the establishment of a MIC with a work plan for the process for the working group.[81] This exchange exhibits the EU's keen interest in the reform process of investor-state dispute settlement mechanisms through participating within the UNCITRAL forum and creating trade policies, which contain judicial forums for the resolution of investment disputes in ne trade agreements.[82]

More recently in Opinion 1/17, the Court has confirmed the compatibility between the investor-state dispute settlement mechanism under the CETA Agreement and EU law. This followed from Belgium's request of opinion from the Court on the compatibility with EU law of the ICS provided for by the CETA. The CETA came in to force in 2017 except the investment provisions. The CJEU was requested to consider the EU's compatibility with the CETA ICS about the following:

(i) the exclusive competence of the CJEU to provide the definitive interpretation of EU law,
(ii) the general principle of equality,
(iii) the requirement that EU law is effective, and
(iv) the right to an independent and impartial judiciary.

In context to the principle of autonomy the Court stated that 'an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law…..provided that 'the autonomy of the EU and its legal order is respected'.[83]

The Court firstly distinguished Achmea on the grounds of mutual trust this principle would not apply to EU and third countries. Secondly, the Court pointed out that just because the CETA's ICS is outside the EU judicial system this in itself does not breach the autonomy of the EU's legal order. There would be breach of autonomy of the EU legal order only if the CETA tribunal would interpret and apply EU rules other than the CETA provisions, or if the CETA tribunal issued awards which would restrict the EU institutions from operating in accordance to the EU constitutional order.[84] The Court agreed that in this instance this would not be the case. The Court clarified that the CETA investment chapter provisions ensure that the measures adopted to satisfy a public interest will not be challenged on the basis of the Treaty. Yet the Court confirmed that the CETA tribunal would have to abide by the national court judgments whilst the national courts would not be bound to the interpretation of domestic law by the CETA tribunal.[85] The CETA tribunal would not also have access to the

[81] Commission presents procedural proposals for the Investment Court System in CETA http://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157631.pdf.
[82] Erika, Szyszczak. Opinion 1/17: Towards a modern EU approach to investor-state dispute settlement. Briefing Paper; May 2019. UK Trade policy Observatory.
[83] Paragraph 57 Opinion 1/17.
[84] Paragraph 8.21 CETA/ paragraph 106-161 opinion 1/17.
[85] Article 8.31 para 2 CETA.

preliminary procedure, as this is only possible via access through the national courts. Subsequently, it seems that the Court has overlooked the problems that would arise if the CETA tribunal would provide a decision that would be based on a misinterpretation of EU law. The Court has not really explored the option of the tribunal gaining access to preliminary ruling, although it was of paramount consideration within the incompatibility decision given by the Court in Achmea.

In regards to the principle of equal treatment the Court stated 'the difference in treatment arises from the fact that it will be impossible for enterprises and natural persons of Member States that invest within the Union and that are subject to EU law to challenge EU Measures before the tribunals envisaged by the CETA, whereas Canadian enterprises and natural persons that invest within the same commercial or industrial sector of the EU internal market will be able to challenge those measures before those tribunals'.[86]The Court here compared EU investors investing in Canada against Canadian investors investing within the EU and held that both parties would have equal access to the CETA tribunal and provisions therefore there was no difference in treatment.

The Court acknowledged that the effectiveness of EU competition law would not be compromised by the CETA tribunal decisions, as this would be within the public interest. If 'in exceptional circumstances an award by the CETA tribunal might have the consequences of cancelling out of a fine'(issued because of breach of competition laws), this would be allowed as 'EU law itself permits annulment of a fine when that fine is vitiated by a defect corresponding to that which could be identified by the CETA tribunal'.[87]

The Court did not find the CETA tribunal breaching the rights of the Court; rather it acknowledged that the CETA tribunal will provide better access for vulnerable private individuals, small and medium sized enterprises.[88]The CETA provisions also provide procedural guarantees to ensure the CETA tribunal's independence such as the tribunal members, remuneration schemes, removal and appointment of judges and rules on ethics. In particular, the Court regards the rules on the functioning of the CETA Joint Committee to guarantee the independence of the CETA tribunal as the CETA Joint Committee does not retain unlimited discretionary powers.[89]

This is an important decision, as it will contribute to the prospect of replacing the investment arbitral tribunal with a multilateral permanent court as the Court itself has envisaged the setting up of a 'multilateral investment tribunal in the longer term'.[90] Nonetheless, the Court will not allow Opinion 1/17 to effect the autonomy of the EU legal order.[91] The principle of

[86] Para 179.
[87] Para 187.
[88] Para 213.
[89] Para 234,228.
[90] Para 108.
[91] Para 109.

autonomy exists towards international law and Member States legislations.[92]It is based on the EU's own constitutional framework derived from Article 2 TEU. Subsequently, the Court will not allow any ICS or MIC to halt the Union from proceeding with its own constitutional framework. The Court was adamant that ICS's must not interpret EU law and any investment protection provisions should allow access to independent courts, as established in the CETA provisions.[93] If the MIC is to be succeed then it will need to deliver on personal integrity, its transparent judicial appointment procedures, lower costs and shorter duration in proceedings.[94]

A new multilateral court may offer the prospects for revised procedural laws adapted for the particular requirements for the disputes these may include: enforcement mechanisms, judicial limitation of the subject matter of the case, limiting the unsuccessful party to just simple reimbursement of the necessary costs, accelerated processes with procedural timelines as done by the WTO. The court may utilise the UNCITRAL Rules on Transparency to ensure that it abides with international standards as it is currently doing within the CETA provisions. The principle of transparency would also be adhered if the procedural documents were available unless their access presented any public interest issues. The negotiations to the new court should be open to the public and allow third parties to provide submissions on those pending cases.[95] The court will require an enforcement for the awards. It may be possible to set up an enforcement fund to pay up to a maximum amount. This fund may be useful for small enterprises, which may not be able to afford to carry out enforcement proceedings against the defendant. The structure of the new investment court would need to be designed to provide individuals access to the court. It could potentially share its infrastructure with institutions such as the ICSID but would need its own organs and independent personality. The costs of the courts including judicial salaries would be consumed by the contracting states depending on their share of global investment. By joining the new court, the contracting states would agree that the new court would replace all other dispute resolution mechanisms, this would then gradually eliminate the use of ad hoc arbitration. The contracting member states would provide their representatives to be a part of the bench of judges. These judges could be selected in accordance to their expertise and would be appointed via a selection process based on the Council of Europe which sets outs basic requirements.

Following Brexit and the lengthy negotiations between the EU and the UK, the TCA has been concluded between the parties.[96] The TCA has also incorporated a dispute settlement mechanism, providing the parties to 'request the establishment of an arbitration tribunal'.[97]This dispute settlement mechanism is limited to resolve disputes between the

[92] Para110.
[93] Para 120,189.
[94] Marc Bungenberg. The multilateral investment court-royal road or dead end for the EU legal order? 5 INTERNATIONAL BUSINESS LAW JOURNAL. 471-487 (2019)
[95] Ibid Page 482 Marc Bungenberg.
[96] Article 12 of the Council Decision 2020/2252 of 29 December 2020, OJL 444/9 of 31st December 2020. Trade and Cooperation Agreement between the European Union, and the European Atomic Energy Community, of the one part and the United Kingdom and Northern Ireland, of the other part(known as TCA). L149/10 (Came into force May 2021).
[97] Article 737 TCA.

parties, and the interpretation needs to be 'in accordance with customary rules of interpretation of public law'.[98] The rulings and decisions of this tribunal will be binding on the parties.[99]The tribunal is an international jurisdiction with the task to resolve the relevant disputes between the parties in international law and 'not to determine the legality of a measure alleged to constitute a breach of this Agreement or any supplementing agreement, under the domestic law of a Party'.[100]

The provisions on the use of dispute settlement mechanisms will not apply to all areas of the agreement including law enforcement and judicial cooperation. They will apply to areas such as trade, transport and fisheries. The dispute settlement mechanism will not operate or be adapted in to any form to overstep the role of the CJEU within the EU legal order or the Withdrawal Agreement (WA).[101] The national courts will have no jurisdiction in the settlement of disputes under the TCA.[102]In addition, no decision of the arbitral tribunal would bind the national courts of either of the parties, with regards the meaning of national law.[103]Hence, a two tier legal system is brought in action with no interrelation between the domestic law of the concerned parties and the international law regimes of the parties. In context, the CJEU is only the domestic court of the EU and not an international jurisdiction with authority to settle disputes or provide binding interpretative judgments for all the parties. This aligns with the recent trend of the EU, whereby the EU confirms that an international agreement in which it is a party to may contain EU rules, and yet not be under the exclusive jurisdiction of the CJEU.[104] However, it is acknowledged that the inability of the TCA dispute settlement mechanism to refer to the CJEU for questions of interpretation of EU law will inevitably act as a barrier of access into the EU internal market for the UK economic operators.

The TCA places restrictions on the competences, decisions and rulings provided by the arbitral tribunal. The Partnership Council (PC) has the competence of managing the TCA. Each party is entitled to refer matters of dispute including interpretation and application of any agreements to the PC.[105] The parties will aim to resolve matters in good faith via consultations, which may be held within 30 days of a written request from the complaining party. If consultations fail then the complaining party can request a tribunal to be set up.[106]

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[98] TCA Art 739.
[99] TCA Art 4.
[100] TCA Art 754.
[101] Council of the European Union (2019) Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. Official Journal of the European Union, 62 (C3841). http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CLEX:12019W/TXT(02)&from-EN. Accessed16/8/2021.
[102] TCA Art 754.
[103] TCA Art 754.
[104] As to reiterate in the CETA judgment the CJEU has concluded that the CETA dispute settlement mechanism did not undermine the autonomy of the EU law, as far as domestic law being taken in to account as a matter of fact. While that Tribunal is expected to follow the prevailing interpretation given to domestic law by the national courts and in converse the national courts are not bound by the Tribunal's interpretations given on such domestic law.
[105] TCA Art 738.

[106] TCA 739.

This would consist of three arbitrators from a list of 15 chosen persons by the parties.[107] The arbitral tribunal will deliver an interim report within 100 days of its establishment, unless both parties allow for time but no more than 12 months for negotiating an outcome to the dispute in question.[108] Each party may send a written request to the tribunal to review certain areas of the interim report within 14 days of its delivery. If no such objections are received, the interim report will become the ruling of the arbitral tribunal.[109]The rulings of the arbitral tribunal are binding on the EU and the UK.[110]The defeated party may request a review from the arbitration tribunal of the relevant compliance measures.[111]

However, tensions may arise, as if an arbitral tribunal is set it will be ancillary to any other arrangements made by the parties to settle the dispute aligned with the TCA or other mutually agreed terms by the parties.[112] Hence, it seems that the tribunal within the TCA has a very limited role to act as a judicial type mechanism in order to creatively interpret the TCA.[113]Thus, there is a dispute settlement mechanism within the TCA but it is limited in scope. Furthermore, this arbitral tribunal may be subject to challenges by other dispute mechanisms including the WA, which maintains a special role for the CJEU in the practical aspects of the EU-UK bilateral relationship including the protection of citizen's rights.

The role of the CJEU is uniquely embedded within the WA. This may be understandable as the UK is a common law system following the stare decisis principle, which in itself may be a viable reason for The CJEU to remain relevant with the UK legal system. Hence, it will continue to have jurisdiction on any proceedings brought by or against the UK before the transition period.[114]Arguably, it will continue to have jurisdiction under Article 258 infringement proceedings even after the transition period.[115]In addition, Article 89WA confirms the binding nature of these judgments in their entirety on the UK. Furthermore, the CJEU has jurisdiction to provide preliminary rulings on cases that began within 8 years from the end of the transition period before a court or tribunal in the UK. In particular, where a question is raised on Part Two of the Agreement or where the court or tribunal deems it necessary in order to provide a judgment in that case.[116]

Moreover, a similar stance is taken with cases linked with Article 18 and 19 on residence documents. Additionally, the CJEU case law is also relevant in a dispute that is submitted to arbitration, which has raised questions on the interpretation of EU law, a question related to the interpretation of this agreement or whether the UK has compiled with its obligations

[107] TCA 752.
[108] See TCA Art 745 and Art 755.
[109] TCA Art 748
[110] TCA. Art. 754
[111] TCA, art 748.
[112] "The parties may at any times reach a mutually agreed solution with respect to any dispute" TCA, Art 756.
[113] "The decisions and rulings of the arbitral tribunal (….) shall not create any rights or obligations with respect to natural or legal persons". TCA Art 754.
[114] Set as 31/12/2020.
[115] Art. 89 WA .
[116] WA.

under Art 89(2). The arbitration panel needs to request CJEU to give jurisdiction that will be binding on the arbitration panel.[117]

To sum up, with the pressures of an ever-expanding EU external trade portfolio, the EU is now utilizing arbitral tribunals as formal dispute settlement mechanisms. This is evident via the use of the CETA investment court and more recently the establishment of such bodies within the EU UK Trade Agreement. In the backdrop, the EU is picking up momentum with its collaborative efforts with the Member States to establish a more permanent Multilateral Investment Court within the EU, which again highlights the EU's keen interest in the reform and adoption of such dispute settlement mechanisms within the EU. The CJEU gave a green signal to the compatibility of the CETA Court against EU law. However, this decision is again to be treated with caution as the Court protects its jurisdiction by emphasizing that such institutions are compatible with EU law only if the autonomy of the EU and its legal order is not compromised.

The results of this study highlight that within commercial and investment cases the CJEU has shown resistance to the use of international dispute settlement mechanisms. Rather it has supported the jurisdiction of the Member State national courts. In doing so, it has protected its jurisdiction. As ultimately, it considers that it should be called upon reference in matters of interpretation and validity of EU law. However amongst the EU's need to expand its international trade portfolio, the Court has declared the CETA Investment Court system to be compatible with the EU legal order, which provides encouraging news for those advocating for the use of other dispute settlement mechanisms in the EU. In contrast to Achmea where the Court pointed out that, the investor-to-state arbitration clauses in BITS concluded between Member States were incompatible with EU law. This decision may lead to a new type of jurisdiction eventually leading to a multilateral court replacing tribunals although yet again the EU has preferred the use of an arbitral tribunal within its arrangement as illustrated within its recent trade agreement with the UK. The CETA decision as it currently stands validates the use of a permeant court with judges within free trade agreements to adjudicate on investor-state disputes. This is a key step to the endorsement of 'a uniform, independent and open judicial protection system for the legal interests of investors in the EU'. [118] The new EU model seems to inhibit the private control of arbitrators and global investors and provides margin of growth of public control of the arbitral decision-making processes through its substantial reforms via the ICS and MIC systems. Nevertheless, collectively both decisions of the Court present one constant namely that any 'tribunal in question would not have the power to bind the CJEU on matters of EU law'.[119] If Brexit was a means to sever the CJEU's jurisdiction, then in reality the court has confirmed its jurisdiction through the WA even beyond the transition period in the interpretation of the treaties and the functioning of the EU legal order.

[117] Ibid.

[118] Supra note 82, Szyszcak.

[119] Editorial. More on autonomy-Opinion 1/17 (CETA). 3 EUROPEAN LAW REVIEW 44 (2019)