

THE INTERACTIONS BETWEEN EU LAW AND INTERNATIONAL INVESTMENT LAW: THE FIVE ACTS OF A KABUKI PLAY

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I. Introduction

The question of the linkages between EU law and international investment law has a long and complex history.¹ The complicated relationship between the two branches is a hot topic in both EU and international law, considering the important number of investment arbitration cases ongoing in an intra-EU setting and the multiplication of EU free-trade agreements developing new investment dispute settlement mechanisms. It is also of great importance for the economic relations between Japan and the EU, most notably after the EPA and JEFTA were concluded.² But the story of these relationships is most conspicuously a story of conflicts between courts and tribunals in the EU and the international judicial system. The case law of the ECJ on international arbitration was always based on a certain Manichean dichotomy between the EU legal order and the arbitral legal order: they would be two worlds apart, based on different fundamental premises (one based on fundamental trust in the national judge, the other aiming to avoid it). This conflict reached a peak with the “big NO” that the ECJ pronounced against intra-EU investment arbitration in the 2018 *Achmea* decision,³ a judgment that investment tribunals disregarded for several reasons, reinforcing the fragmentation between EU constitutional law and international investment law. Nevertheless, the recent Opinion 1/17⁴ sounded like a “big YES” to a reformed ISDS model in extra-EU relations.

The overall idea of this article is to theorize how the ECJ progressively constructed a *regime conflict* (using the expression of Gunther Teubner and Andreas Fischer-Lescano⁵) between EU law and investment arbitration. The Court purposefully created fragmentation by

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¹ M. Burgstaller, “European Law and Investment Treaties,” *Journal of International Arbitration*, Vol.26 (2009), p.181-216; C. Herrmann, “Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon,” *EuZW* (2010), p.207 ss.; C. Söderlund, “Intra-EU BIT Investment Protection and the EC Treaty,” *Journal of International Arbitration*, Vol.X (2007), pp.455-468; H. Wehland, “Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?” *ICLQ*, Vol.58 (2009), pp.297-320; B. Poulain, M. Raux, “Actualité du droit européen des investissements internationaux,” *RGDIP* (2011), pp.113-140; S. Robert-Cuendet, “Les investissements intracommunautaires entre droit communautaire et accords internationaux sur l’investissement: concilier l’inconciliable?” *RGDIP* (2011), pp.853-895.

² Y. Nakanishi, “Economic Partnership Agreement between Japan and the European Union and Legal Issues: A Focus on Investment,” *Hitotsubashi Journal of Law and Politics*, Vol.44 (February 2016), pp.19-30.

³ ECJ, judgment of March 6, 2018, *Achmea*, EU:C:2018:158.

⁴ ECJ, opinion of April 30, 2019, *EU-Canada CET Agreement*, ECLI:EU:C:2019:341).

⁵ A. Fischer-Lescano, G. Teubner, *Regime-Kollisionen—Zur Fragmentierung des globalen Rechts* (Frankfurt: Suhrkamp, 2006), p.230.

strategically creating a regime conflict that resulted in putting intra-EU investment arbitration to death. It remains to be clarified how this general philosophical approach will evolve and articulate with the new FTA mechanisms, with the most recent developments of ECJ case law.

To understand the reasons and the implications of the analysis of these linkages, one has to see the evolution of the case law with its continuities and its ruptures. As a whole, this story can be described as a Kabuki play. First, it is composed of five acts. Second, it implies the cooperation of different actors meeting on the same scene: the ECJ, investment tribunals, EU organs, and civil society. Third, the evolution of these linkages in the case law follows a certain *johakyu* typical of Kabuki plays (序破急), a *crescendo* in intensity that started slowly in the first ECJ cases on arbitration and escalated quickly with the beginning of the *Achmea* context.

II. *First Act: The ECJ and International Commercial Arbitration*

The first act of our play does not directly concern international investment law, but the case law of the ECJ having dealt with international commercial arbitration. Indeed, this body of cases has constituted the intellectual background against which the Court has subsequently developed its reflection on international investment arbitration. Understanding the reasons behind the ECJ's approach to international commercial arbitration is, therefore, necessary to set the scene.

1. **Arbitral Tribunals: Not “Courts and Tribunals” and Unable to Refer Preliminary Questions**

The first fundamental issue concerns the role of arbitral tribunals within the EU judicial system and most notably their ability to seek a preliminary ruling of the ECJ. The answer to this question dates back to the 1982 *Nordsee* case.⁶ The Court rejected the possibility for arbitral tribunals to use the preliminary reference mechanism, even if the court admitted that “there are certain similarities between the activities of the arbitration tribunal in question and those of an ordinary court or tribunal inasmuch as the arbitration is provided for within the framework of the law, the arbitrator must decide according to law and his award has, as between the parties, the force of *res judicata*, and may be enforceable if leave to issue execution is obtained.” In other words, it considered that these similarities were not enough for the qualification of “court and tribunal” within the meaning of the preliminary reference scheme.⁷ For the Court, the main differences consisted in the fact that there was no obligation for the parties to go to arbitration, which was a decision made out of their free choice and without any involvement of public authorities.⁸ Therefore, as the parties are not free to circumvent *via* their recourse to arbitration the respect of EU law within the territory of a member state, it is for national courts to verify the EU law-compatibility of the outcome of the

⁶ ECJ, judgment of March 23, 1982, “*Nordsee*” *Deutsche Hochseefischerei GmbH contre Reederei Mond Hochseefischerei Nordstern AG & Co. KG et Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*, ECLI:EU:C:1982:107.

⁷ *Ibid.*, § 10.

⁸ *Ibid.*, § 11-12.

arbitration within their “supervisory function”⁹ (as *juge d’appui*).

The Court has repeatedly confirmed this position¹⁰ and admitted very few exceptions. It is in those cases where the arbitral tribunal presented peculiar features, making it a *sui generis* body more comparable to a part of a national judiciary, that the Court decided otherwise. This was the case for mandatory arbitrations (*Danfoss* case),¹¹ for arbitration mechanisms fully integrated into a national judicial system (*Merck Canada* case),¹² or permanent ones (*Ascendi* case).¹³

This way of conceiving arbitration, being a separate legal dimension accepted by the parties by contractual mutual consent, motivates the philosophical attitude of the Court. Arbitration is accepted between merchants, for efficiency and pragmatic purposes, but it does not constitute an integral part of the EU judicial system. It is interesting that this vision is particular to the EU law integration system. For instance, the Court of Justice of the Andean Community (TJCA) has opted for the opposite solution and asks arbitral tribunals to refer preliminary questions, even establishing a legal obligation to do so if they know the case on the merits as the last instance.¹⁴

2. Exclusion of Arbitration from the Brussels System

The ECJ would perpetuate this attitude of “tolerance by exclusion” of international commercial arbitration in the 1991 *Rich* case. The question was for the Court to clarify the provision of the 1968 Brussels Convention excluding arbitration from its scope of application. In that case, the Court referred to the *travaux préparatoires* of the Convention, the so-called Jenard Report that had considered it preferable to carve out arbitration from the EU judicial organization instruments as arbitration was already covered by other instruments (i.e., the 1958 New York Convention). The Court strengthened the impact of the arbitration carve-out: “By excluding arbitration from the scope of the [1968 Brussels] Convention on the grounds that it was already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts.”¹⁵

The Court followed up in its vision of the arbitration sphere and the EU legal spheres as

⁹ *Ibid.*, § 14-15.

¹⁰ ECJ, judgment of January 27, 2005, *Guy Denuit and Betty Cordenier v Transorient—Mosaïque Voyages et Culture SA*, ECLI:EU:C:2005:69 (concerning an arbitral tribunal competent for tour-operator disputes in Belgium, the *Collège d'arbitrage de la Commission de Litiges Voyages*, notably because of its optional and temporary character).

¹¹ ECJ, judgment of October 17, 1989, *Handels-og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, ECLI:EU:C:1989:383.

¹² ECJ, order of February 13, 2014, *Merck Canada Inc. v Accord Healthcare Ltd and Others*, ECLI:EU:C:2014:92.

¹³ ECJ, judgment of June 12, 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v Autoridade Tributária e Aduaneira*, ECLI:EU:C:2014:1754 (concerning the Portuguese Tax Arbitration Tribunal).

¹⁴ TJCA, *ETB S.A. E.S.P. v Colombia*, proceso 3-AI-2010, *GOAC* n. 1985, October 11, 2011. See M. Peña-Pinon, *La fonction juridictionnelle au service de l'intégration sud-américaine* (Baden-Baden: Nomos, 2016), p.406.

¹⁵ ECJ, judgment of July 25, 1991, *Marc Rich & Co. AG v Società Italiana Impianti PA*, EU:C:1991:319, § 17 and 18. Insightful comments: *Rev. arb.* (1991), p.677, note D. Hascher; *Rev. crit. DIP* (1993), p.310, note P. Mayer. In this case, the ECJ considered that the appointment of arbitrators by a national court (as court of the seat of the arbitration) is a matter excluded from the scope of the 1968 Brussels Convention, notwithstanding the fact that the existence or validity of an arbitration agreement is a preliminary issue in the court proceedings regarding the arbitrator's appointment (§ 26-29).

two worlds apart, whose relations were governed by an idea of mutual exclusion. This idea, already present in the *Nordsee* decision, is intellectually identified with the works of the Jenard Report and subsequently confirmed.¹⁶

This mutual exclusion philosophy was nuanced in the much-commented-upon *West Tankers* case.¹⁷ In this case, while admitting that arbitration was excluded in the Brussels I Regulation (the successor to the Convention), the ECJ noted that “even though proceedings do not come within the scope of Regulation No.44/2001, they may nevertheless have consequences that undermine its effectiveness, namely preventing the attainment of the objectives of unification of the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions in those matters. This is so, *inter alia*, where such proceedings prevent a court of another member state from exercising the jurisdiction conferred on it by Regulation No.44/2001.”¹⁸

It had in fact already been pointed out that “the idea of separating arbitration from European procedural law is an illusion.”¹⁹ The Court considered contrary to the Brussels I Regulation an anti-suit injunction of the English courts (of the seat of arbitration), restraining Allianz from pursuing a civil suit before the Italian courts in breach of the arbitration agreement. The Court considered that the subject matter of the civil claim before the Italian courts and the preliminary verification of the validity of the arbitration agreement came within the scope of the Brussels I Regulation, the exclusion notwithstanding. This solution was harshly criticized in the arbitration arena: it would be counterproductive for economic operators and the development of arbitration with seats in the EU.²⁰

In *Gazprom*, the Court opted for a different solution,²¹ which reiterated the perspective of the mutual exclusion of EU procedural law and arbitration. Rendered upon the conclusions of Advocate General Wathelet whose position was inclined to the maximization of the autonomy of arbitration, the Court operated a distinction and decided that, as the anti-suit injunction had been adopted by an arbitral tribunal, the *West Tankers* solution did not hold. The Brussels I Regulation applies to relations between national jurisdictions while arbitral tribunals’ decisions are carved out.

¹⁶ ECJ, judgment of November 17, 1998, *Van Uden Maritime BV, trading as Van Uden Africa Line v Kommanditgesellschaft in Firma Deco-Line and Another*, ECLI:EU:C:1998:543. The ECJ considered that, under Article 24 of the Convention, it could order provisional measures in support of arbitration, as provisional measures do not concern arbitration as such but the protection of some different rights of the parties.

¹⁷ ECJ, judgment of February 10, 2009, *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.*, ECLI:EU:C:2009:69 with insightful comments *Europe* (2009), comm. 176, note L. Idot; *Rev. arb.* (2009), p.407, note S. Bollée; *JDI* (2009), p.1281, note B. Audit; *Rev. crit. DIP* (2009), p.373, note H. Muir Watt.

¹⁸ *Ibid.*, § 24.

¹⁹ B. Hess, “Improving the Interfaces between Arbitration and European Procedural Law—The Heidelberg Report and the EU Commission’s Green Paper on the Reform of the Regulation Brussels I,” *Cahiers de l’arbitrage* (2010), p.17.

²⁰ P. Théry, “Aux frontières du règlement 44/2001: arbitrage, injonction et confiance mutuelle,” *RTD Civ.* No.357 (2009); P. Callé, “Incompatibilité des anti-suit injunctions avec le règlement (CE) n° 44/2001 du 22 décembre 2000,” *JCP*, No.227, (2009).

²¹ ECJ, judgment of May 13, 2015, “*Gazprom*” *OAO v Lietuvos Respublika*, ECLI:EU:C:2015:316.

3. EU Public Policy as a Limit to Arbitral Action

The last constellation of cases concerns the limits set by EU public policy to the autonomy of arbitration. The ECJ has progressively recognized that EU competition law (*Eco Swiss China* case) and consumer law (*Mostaza Claro* case) are part of public policy considerations that can lead to the nullity of an arbitral award in the EU legal sphere.

In *Eco Swiss*, the Court considered that “where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article [101 TFEU]”;²² therefore, the respect of the prohibition of restrictions to competition becomes an important limit to the functioning of arbitration. This solution has been confirmed in the *Genentech* case, where the Court ruled that the competition rules of Article 101 TFEU form part of the public policy that the Dutch courts should apply when reviewing awards.²³

III. *Second Act: The ECJ and BITs: The 351 TFEU Cases*

In a second step, the Court of Justice considered the question of the material compatibility of the provisions of bilateral investment treaties (BITs) with the fundamental rules of the internal market. This group of cases is less well known, even if the analysis of the Court can illustrate fundamental points on the relationship between EU law and international investment law. These cases concerned the application of Article 351 TFEU, the grandfather clause provision, to the BITs concluded with a third party by a member state before its accession.

The central parts of Article 351 TFEU read as follows:

The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established.

In a series of cases brought by the Commission to the ECJ on the basis of infringement proceedings, the Court considered consistently²⁴ (with one peculiar exception²⁵) that, by not having taken appropriate steps to eliminate incompatibilities concerning the provisions on

²² ECJ, judgment of June 1, 1999, *Eco Swiss*, EU:C:1999:269, § 37-41.

²³ *Ibid.*, § 39.

²⁴ ECJ, judgment of March 3, 2009, *Commission v Austria*, EU:C:2009:118; judgment of March 3, 2009, *Commission v Sweden*, EU:C:2009:119; Judgment of November 19, 2009, *Commission v Finland*, EU:C:2009:715.

²⁵ The case *Commission v Slovakia* (judgment of September 15, 2011, *Commission v Slovakia*, EU:C:2011:580, § 51-52) is special as it is based on the fact that Slovakia had concluded a contract granting preferential treatment to a Swiss investor in the electricity market, whose provisions became subsequent to the accession in violation of the EU directive on the liberalization of the electricity market. The ECJ considered that the contract did not provide for a unilateral denunciation possibility and therefore Slovakia could not terminate it without breaching its BIT obligations. For this reason, the special treatment was considered covered by Article 351 TFEU.

transfer of capital contained in the investment agreements, member states had failed to fulfill their obligations under the second paragraph of Article 351 TFEU.

As AG Maduro stressed in his opinion, the problem laid in the fact that the contested BITs provided for a “free transfer of capital” clause that allowed no restriction (any such restriction entailing the violation of an international obligation). Much to the contrary, EU law foresees some cases where a member state or the EU is allowed to restrict freedom of movement to pursue other forms of general interest.²⁶ We are therefore faced with the classical debate on the “right to regulate”: international economic obligations might risk asphyxiating the power of the state to pursue other necessities, taking into consideration only an economic *telos* and being blind to other possible settings.²⁷

It is important to not read too much into the Court judgments that focused on the very compatibility of the BITs’ “free transfer of payments” clauses with the specific exceptions foreseen in the treaties. Nevertheless, the general idea here is that EU law aims to ensure the flexibility of sovereign rights and EU rights to put between brackets free transfer obligations in necessary circumstances, whereas investment agreements function from a one-sided perspective that does not even contemplate this eventuality.

IV. *Third Act: Opinion 2/15*

A fundamental question that remained unsolved concerned the competences of the Union concerning investment issues in general and international investment arbitration in particular. The ECJ had the opportunity to clarify this point in 2017,²⁸ in the framework of the conclusion of a free-trade agreement between the EU and Singapore. In the treaty-making process, the Commission seized the Court based on Article 218(11), to clarify the repartition of the treaty power between the EU and member states concerning the different issues at stake in the FTA: trade *lato sensu*, public procurement, sustainable development, investment, and investor-state arbitration.

The fundamental question asked of the Court concerned the nature of the FTA under EU law;²⁹ was it to be considered a treaty that EU institutions could negotiate and conclude alone or was it a “mixed agreement” that required the help of member states?³⁰ The Court, going

²⁶ Opinion of AG Maduro, ECLI:EU:C:2008:391, § 7: “The Treaty puts the free movement of capital to and from third countries on an equal footing with that between Member States. Article 56 EC prohibits any restrictions on either, as well as any restrictions on payments between Member States and to and from third countries. However, the Treaty permits certain restrictions to be imposed by Member States (notably in Article 58 EC, which sets out several justifications) and, more importantly for the present cases, by the Community itself.”

²⁷ See J. Trachtman, *The International Economic Law Revolution and the Right to Regulate* (London: Cameron May, 2006).

²⁸ ECJ, opinion of the Court (Full Court) of May 16, 2017, *Accord de libre-échange avec Singapour*, ECLI:EU:C:2017:376.

²⁹ D. Simon, “L’avis 2/15 sur l’accord de libre-échange entre l’Union et Singapour: un apport majeur pour les modalités de conclusion des accords ultérieurs ‘de nouvelle génération’ (CETA, TAFTA, nouveau ‘partenariat’ avec le Royaume-Uni),” *Europe*, No.7 (July 2017), pp.6-11.

³⁰ Opinion 2/15, § 30 and 31. See S. Van Raepenbusch, “Le clair-obscur des compétences externes de l’Union. Quelques réflexions autour de l’avis 2/15 de la Cour de justice de l’Union du 16 mai 2017, ‘accord de libre-échange entre l’Union européenne et la république de Singapour,’” *L’Europe au présent!* (ELS Belgium s.a., Éditions Bruylant,

further than what AG Sharpston had proposed, considered that the EU had exclusive competence for almost all the topics at stake but for investment arbitration, and that made the FTA a mixed agreement.

1. Clarification of the External Competences to Conclude Investment Treaties

As is well known, the Court of Justice has progressively systematized the functioning of external competences of the EU for the conclusion of treaties with third states. This system functions on a *summa divisio*: the treaties provide for some explicit external competences on the one hand; otherwise, the Court has progressively established some implied competence cases (starting with the well-known *ERTA* doctrine).

At the forefront of those explicit external competences is Article 207 TFEU, the competence of the EU to conclude treaties in the framework of the Common Commercial Policy (CCP). The ECJ has progressively enlarged the scope of the concept of the CCP, starting with Opinion 1/78 where it affirmed that Article 207 was not a restrictive list of components of the CCP. Nevertheless, in a pre-Lisbon context, Article 207 was strictly linked to the idea of trade. The Court progressively expanded this limit and in *Daichi Sankyo* it confirmed that the concept had to be interpreted largely (to all trade issues, including intellectual property rights) and Opinion 2/15 can be read in this continuity, having affirmed that the text of Article 207 TFEU gave to the EU an exclusive competence regarding foreign direct investment (FDI).³¹ As Kleimann and Kübek summarized, “Opinion 2/15 confirms the tectonic shifts of competence that the Lisbon Treaty has brought about in the area of EU Common Commercial Policy.”³²

To achieve this objective, the Court disagreed with its AG.³³ It construed Article 207 in light of the objectives established in Articles 3(5) and 21 TEU, which AG Sharpston had considered “not relevant to resolving the issue of competence” and not affecting “the scope of the common commercial policy laid down in Article 207 TFEU” (para. 495), concluding that the sustainable development chapter still fell under the competences shared with the member states. On the other hand, the Court linked this extensive reading of Article 207 to a post-Lisbon change: “The FEU Treaty differs appreciably from the EC Treaty previously in force, in that it includes new aspects of contemporary international trade in that policy” and the “extension of the field of the common commercial policy by the FEU Treaty constitutes a significant development of primary EU law.”³⁴

The Court considered that FDI was of the exclusive competence of the EU, without any distinction between admission and protection issues,³⁵ rejecting the position of the Council on this point. Nevertheless, indirect investment was of the shared competence of the EU and the member states. Another fundamental limitation to the exclusive competence of the EU is ISDS, for which the Court followed a particular reasoning.

2018), pp.739-766.

³¹ Opinion 2/15, § 83.

³² D. Kleimann, G. Kübek, “The Singapore Opinion or the End of Mixity as We Know It,” *Verfassungsblog*, <https://verfassungsblog.de/the-singapore-opinion-or-the-end-of-mixity-as-we-know-it/>.

³³ M. Dony, “L’avis 2/15 de la Cour de justice: un jugement de Salomon?” *Revue trimestrielle de droit européen*, No.3, (2017), pp.525-554.

³⁴ Opinion 2/15, § 141.

³⁵ *Ibid.*, § 87.

2. Articulation of Investment Arbitration with the National Judge

The second fundamental aspect of Opinion 2/15 for the relationship between EU law and international investment law concerns the way the Court depicted the functioning of international investment arbitration. In a remarked paragraph 292, the Court claimed that

such a regime, *which removes disputes from the jurisdiction of the courts of the Member States*, cannot be of a purely ancillary nature within the meaning of the case-law recalled in paragraph 276 of this opinion and cannot, therefore, be established without the Member States' consent.

Several points deserve attention. From an EU external relations perspective, the Court established a fundamental distinction between FDI and ISDS, underlining that only the former pertained to the exclusive external competence of Article 207 TFEU. The presence of a chapter on the latter made the EU-Singapore FTA a mixed agreement.

From an international investment law perspective, it is interesting to note that the Court clarified the philosophical meaning of the ISDS provision. First, it established that the ISDS provision is fundamental within the legal structure of investment treaties: the idea of access to an investment tribunal is at the core of international investment treaties, a pivotal function for which they were concluded. Second, the ECJ aptly clarified that ISDS was conceived so that it “removes disputes from the jurisdiction of the courts of the Member States,” and the whole objective of investment arbitration is indeed to avoid the jurisdiction of the national judge and to elevate the investment dispute to the international sphere. But, for this to be possible, a member state's consent is of fundamental importance. This analysis is in line with the fundamental principle of international dispute settlement that is the idea of *justice consensuelle*. Moreover, the Court inserted in this paragraph a fundamental philosophical distinction between EU procedural law and international investment law: if the latter is based on mistrust in the national judge, the former is entirely based on the idea of trust in the national judge who is the fundamental actor of the EU judicial system (the *juge de droit commun*, as the *Simmenthal* case put it). This idea can explain the evolution of the case law of the Court in *Achmea*.

V. Fourth Act: *Achmea*

Building on this fundamental idea according to which investment arbitration would be irradiated by the idea of mistrust in the national judge whereas the EU judicial system is founded on the trust in the fundamental role of the national judge, the ECJ found in the *Achmea* case that investment arbitration was not compatible with the basic principles of EU procedural law (Articles 267 and 344 TFEU) or with the principle of autonomy.³⁶ With its judgment, the Court declared the incompatibility with EU law of intra-EU investment arbitration.

³⁶ D. Simon, “L’arbitrage en matière d’investissement remis en cause par la Cour de justice?,” *Europe*, No.5 (May 2018), pp.5-9 (for an EU perspective); J. Cazala, “L’incompatibilité avec le droit de l’Union européenne du système d’arbitrage investisseur-État contenu dans un traité bilatéral d’investissement intra-UE,” *Revue trimestrielle de droit européen*, No.3, (2018), pp.597-616 (for an international law perspective).

For this reason, the *Achmea* judgment can be considered the *mie* (見得) moment of our Kabuki play. The *mie* is a powerful moment where a fundamental character stops and his emotions reach a climax. Being the crux of the story, the spectators shout at the actor words of admiration, a moment that is called the *kakegoe* (掛け声). In our play, the ECJ operated this climax using the most fundamental constitutional principles of EU law to reject investment arbitration out of its legal sphere. To this *mie*, investment arbitrators answered with a very unwelcoming *kakegoe*, finding different ways to consider this decision non-pertinent in their legal sphere.

1. The Constitutional Decision of the ECJ, the *Mie* Moment

The case stems from an UNCITRAL investment arbitration in the *Achmea v Slovak Republic* case, originally named *Eureko v Slovak Republic*. The investor had received damages for violation of the BIT (FET and free transfer of payments clauses) because of the Slovak ban on profits and ban on transfers. Now, as in UNCITRAL proceedings the competence for annulment is given to the national jurisdictions of the seat of arbitration, the German Supreme Court, in the framework of the annulment proceedings, sought a preliminary ruling on the compatibility of the ISDS clause of the BIT with EU law.

The judgment of the Court is without any doubt a climax.³⁷ The first reason for this is that the ECJ took a different approach towards this case than the one proposed by its AG Melchior Wathelet. It is already quite rare that the Court does not follow its AG, but it is even more spectacular to see how the Court answered in a drastically opposite direction to the remarked *pro-investment arbitration* opinion of the advocate general.

The AG asked the Court to consider an investment tribunal as a “court or tribunal” within the meaning of Article 267 TFEU,³⁸ so that arbitral tribunals are bound to observe the primacy of EU law over *inter se* international engagements. For this reason, there would be no incompatibility with Article 344 TFEU, which only applies to inter-state disputes. We know that, in any event, member states’ courts can ensure compliance of intra-EU investment awards with EU law through annulment as well as recognition and enforcement proceedings.

Internal ECJ gossip had leaked, and some authors considered that the AG’s opinion would have been written by an ISDS lobbyist, a legal clerk who had worked in one of the most active investment arbitration law firms and was trying to change the case law of the Court in a more ISDS-friendly direction.³⁹ Be that as it may, the ECJ did not follow this argument but did quite the opposite.

During the hearings, only France, Germany, the Netherlands, Austria, and Finland defended the compatibility of investment arbitration, whereas the Commission and a large number of intervening states (Slovak Republic, Czech Republic, Estonia, Greece, Spain, Italy, Cyprus, Latvia, Hungary, and Romania) pleaded for the incompatibility of ISDS with regards to Articles 267 and 344 TFEU and with Article 18 TFEU. For the first group, Article 344 TFEU

³⁷ J. Wildemeersch, “L’arrêt Achmea, la rigueur des principes au risque d’un certain isolationnisme juridictionnel?” *L’Observateur de Bruxelles* (2018), p.40 ff.

³⁸ Opinion of AG Wathelet, § § 84-131.

³⁹ A. Wessel, “An ISDS lobbyist in the EU Court of Justice?” at <http://blog.ffii.org/an-isds-lobbyist-in-the-eu-court-of-justice/>.

would only apply to inter-state arbitration; the Court should consider an investment tribunal as a “court or tribunal” within the meaning of Article 267 TFEU. In the case of UNCITRAL arbitration, even if we do not consider investment tribunals as courts according to Article 267, the national judge will be able to ensure the conformity of the decision to EU law in the annulment phase (*Eco Swiss* and *Nordsee* cases). The member state will be responsible for controlling the conformity of the award to EU law and eventually not for enforcing them (*Genetech* and *Nordsee* cases).

According to the Commission, EU law offers autonomous and global protection of foreign investments, and it leaves no space for any other kind of protection. Any dispute settlement mechanism acting inside the EU legal order should enable full access to the ECJ (quoting the *Melki* case); otherwise, this mechanism has to be seen as contrary to Articles 267 and 344 TFEU, notably for the preservation of the monopoly of interpretation of the ECJ. The only limitations to this structural principle are of restrictive interpretation (quoting *Gazprom*). For the Commission, intra-EU BITs date back to another epoch, to a transitional phase for some member states that had to increase their standards of protection of foreign investment. They have no longer their *raison d’être* in the framework of the internal market. The ECJ should, therefore, follow the approach of Opinion 2/13 on accession to the ECHR and reaffirm the autonomy of the EU legal order.

This division shows how capital exporter states, on the one hand, tried to defend a mechanism that seemed economically advantageous for them, whereas capital importer states believed that the investment arbitration system had shown its fallacies. It is interesting to remark that Greece, for instance, has strongly relied on the NGO report “Profiting from injustice” in its oral intervention.⁴⁰ Spain, instead, recalled to the Court how the current system had exposed the state to multiple investment claims that choke a state’s right to regulate and criticized, among others, the approach of tribunals towards refusing to let the Commission intervene in recent intra-EU arbitrations asking it to bear the costs incurred by the parties.

In a beautiful *mie* moment, the Court rendered a judgment that has the flavor of a landmark decision, using a very EU constitutional law language to protect the autonomy of the EU legal system. The reasoning of the Court focused on a pure EU procedural law perspective. The Court uses a constitutional language, starting from a long premise on the content of two fundamental principles: autonomy of EU law and mutual trust. The *Achmea* judgment strongly relied on the idea of “autonomy” of EU law as one of the fundamental axiological premises of EU constitutional law, a fundamental concept leading to the conclusion of incompatibility of the BIT dispute settlement clause with EU law. The term “autonomy” is mentioned eight times in the judgment, and the Court clearly stated that “in those circumstances, Article 8 of the BIT has an adverse effect on the autonomy of EU law.”⁴¹ In this line of reasoning, the link between Opinion 2/13⁴² and the *Achmea* judgment is particularly interesting. There, the ECJ quoted it seven times in the context of its answers to Questions 1 and 2 (between Paragraphs 32 and 57 of the *Achmea* judgment), presenting Opinion 2/13 and its interpretation of the autonomy of EU

⁴⁰ C. Olivet, P. Eberhardt, “Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom” (2012) < www.tni.org/files/download/profitfrominjustice.pdf > accessed August 3, 2019

⁴¹ ECJ, judgment of March 6, 2018, *Achmea*, § 59.

⁴² ECJ, Opinion 2/13 of December 18, 2014, *Accession of the European Union to the ECHR*, EU:C:2014:2454.

law as the starting point of its reasoning and making the outcome reached in *Achmea* a direct conclusion stemming from this precedent. This extensive use of Opinion 2/13 shows that the ECJ was deeply conscious of facing a sensitive issue, which entailed the protection of the core norms of EU law. The answer given in *Achmea* focused on the constitutional structure of the EU legal system.⁴³

The Court purposefully constructed a regime conflict. It considered that arbitral tribunals could not refer questions of interpretation of EU law to the ECJ.⁴⁴ For this reason, because of the risk of a wrongful interpretation of EU law on their side and of a limited control *ex post* on the side of national judges,⁴⁵ ISDS provisions contained in intra-EU investment treaties concluded between the member states are incompatible with Articles 267 and 344 TFEU. The Court underlined that the annulment judge was in the EU legal sphere just by chance as nothing in the BIT imposed such a condition and that the parties may as well have decided to elect Singapore or any other extra-EU legal system for annulment, subtracting the award to any *ex-post* EU law conformity control.⁴⁶ As we see, the Court declared investment arbitration contrary to the most fundamental principles of EU procedural law, to the philosophical basis of the EU judicial system.

2. The Answers of Investment Tribunals, a Peculiar *Kakegoe*

The answers of investment tribunals to this *mie* moment of the ECJ were not as enthusiastic as *kakegoe* generally are. The investment arbitration community reacted in general with bitterness towards the decision, considered to be a mind-blind reaction of the ECJ, following its logic exclusively without understanding the one of investment law.⁴⁷ Similarly, investment tribunals have found until now all possible solutions to avoid taking into account the *Achmea* judgment, to decide on intra-EU disputes despite the declaration of incompatibility with EU law.⁴⁸ I consider this saga a splendid manifestation of intentional fragmentation of the

⁴³ ECJ, judgment of March 6, 2018, *Achmea*, § 32-33: “In order to answer those questions, it should be recalled that, according 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. That principle is enshrined in particular in Article 344 TFEU, under which the Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraph 201 and the case-law cited). Also according 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. 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 interdependent legal relations binding the EU and its Member States reciprocally and binding its Member States to each other (see, to that effect, Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 165 to 167 and the case-law cited).”

⁴⁴ A. Ciampi, “Perché il diritto europeo rimanga com'è, la nozione autonoma di ‘giurisdizione nazionale’ deve cambiare,” *Giurisprudenza italiana* (2018), pp.1977-1978.

⁴⁵ ECJ, *Achmea*, § 45-49 and 52-53.

⁴⁶ ECJ, *Achmea*, § 52-56.

⁴⁷ E. Gaillard, “L'affaire Achmea ou les conflits de logiques,” *Revue critique de droit international privé*, No.3 (2018), pp.616-630.

international legal order.

Arbitral tribunals have consistently rejected the idea that the *Achmea* judgment of the ECJ could have a bearing on their jurisdiction.⁴⁹ In the first line of reasoning, some tribunals have reached a different conclusion from the ECJ on the relationship between EU law and international investment law, contesting its position on the merits. They defend, to the contrary, the absence of incompatibility between the two regimes, as did the tribunal in the *Isolux* case considering that EU law does not prohibit the submission of a dispute to investment arbitration.⁵⁰

A second reasoning has rejected *Achmea* as being a non-pertinent legal fact, because of the difference of legal nature of the treaty used as a basis for jurisdiction. In the *Masdar* award,⁵¹ the tribunal stressed the fact that the *Achmea* decision was of “limited application,”⁵² since it focused on the incompatibility of a bilateral investment treaty in the intra-EU context. The basic distinguishing criterion is the difference between the bilateral context of the *Achmea* case and the multilateral context of an ECT-based arbitration.

A third reasoning has strongly advocated the parallelism of treaties and refused to admit any conflict between the investment treaty and the European treaties. This is clearly the case for the *RREEF* award, rendered by a tribunal presided over by Alain Pellet who summarized his theory according to which EU law is simply a special body of international law: if any hierarchy has to exist, international law has to be given priority.⁵³ But the most common position is the one explained in the *Anglia* award where the tribunal stated that the BIT tribunal has jurisdiction only to determine the matters of interpretation and application of the BIT. Therefore, as the BIT tribunal has no jurisdiction to interpret the TFEU, EU law has no bearing on an enforceable treaty existing in the international legal order.⁵⁴

With this fourth act, the initial reciprocal ignorance and tolerance of the EU and investment worlds finished. We pass from acceptance by mutual exclusion to a conflict of mutual rejection. Nevertheless, the last episode of the play may change the situation for the future.

VI. *Fifth Act: Opinion 1/17*

Recently, the ECJ had the opportunity to decide on the interactions between EU law and international investment law in the framework of the CETA treaty conclusion, and therefore in the context of external relations and no longer on the issue of compatibility of ISDS within the

⁴⁸ C. Verburg, N. Lavranos, “Recent Awards in Spanish Renewable Energy Cases and the Potential Consequences of the *Achmea* Judgment for Intra-EU ECT Arbitrations,” *European Investment Law and Arbitration Review* (Queen Mary University of London and EFILA) Vol.3 (2018), pp.197-222.

⁴⁹ A. Gourgourinis, “After *Achmea*: Maintaining the EU Law Compatibility of Intra-EU BITs Through Treaty Interpretation,” *European Investment Law and Arbitration Review*, Vol.3 (2018), pp.282-315.

⁵⁰ *Isolux Infrastructure Netherlands, BV v. Kingdom of Spain*, SCC Case No.V2013/153, Award, July 12, 2016, pp.645-655.

⁵¹ *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No.ARB/14/1, Award, May 16, 2018.

⁵² *Ibid.*, § 679.

⁵³ *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No.ARB/13/30, Decision on Jurisdiction, June 6, 2016, § 75-79.

⁵⁴ *Anglia Auto Accessories Ltd. v. Czech Republic*, SCC Case No.V2014/181, Final Award, March 10, 2017, § 127.

internal market. Seized on the basis of Article 218(11) TFEU, the Court had to decide whether the new investment court system (ICS) foreseen in the agreement was compatible with the treaties.⁵⁵ CETA indeed included an ISDS mechanism that progressively tries to do away with the major flaws of investor-state arbitration, reinforcing independence and impartiality guarantees, establishing an appellate mechanism on the image of the WTO, and clarifying some vague substantial standards.

After the “big NO” of *Achmea*, the Court pronounced a “big YES” to the ICS.⁵⁶ This position was defended during the hearing where all intervening parties were defending the compatibility of the ICS with EU law, apart from Slovenia who pleaded for a partial transposition of the *Achmea* reasoning. Following the doubts of Belgium, Slovenia was hesitant in considering the ICS as a court or tribunal in the sense of Article 267 TFEU, and, for that reason, the application of EU law “as a fact” by the ICS would still be a problem for the autonomy of the EU legal system. On the other hand, all other member states, the Council, and the Commission strongly underlined the structural difference between the old model of investment arbitration and the ICS and considered that the mere consideration of the EU as a fact was a sufficient guarantee for the autonomy of EU law.⁵⁷

1. An Acceptance of a New Model of ISDS with Stronger Guarantees

The basic idea behind the Opinion is that the CETA mechanism seems to provide textual guarantees that are strong enough to pronounce the theoretical compatibility of the ICS with EU law. We should not forget that the Court operated in the framework of an Article 218(11) procedure, therefore focusing primarily on the satisfactory content of the EU law compatibility of the text of an international agreement, a function that could partially explain the high degree of formalism used.

To summarize, the Court emphasized three points. First, the ECJ saw no problems with the autonomy of the EU legal order.⁵⁸ Autonomy would indeed be in danger if the CETA tribunal could interpret and apply EU law or if its function would prevent an EU institution from accomplishing its constitutional role foreseen in the treaties. Now, the Court recalled that the principle of mutual trust did not apply in external relations and that EU law would be used as a fact and not as law.

Second, the Court was asked to decide on the discriminatory nature of the ISDS system. Indeed, this is a peculiar trend of international investment law adjudication, empowering some foreigners and leaving other foreigners not covered by the treaty and nationals without this additional form of protection. Carlos Calvo strongly criticized this structural fallacy as unacceptable. For the Court,⁵⁹ no problem existed from the perspective of equal treatment as the

⁵⁵ B. Scholtka, “Freihandelsabkommen der EU mit Kanada (CETA) europarechtskonform,” *Neue Zeitschrift für Verwaltungsrecht* (2019), pp.868-870.

⁵⁶ For a brilliant analysis, see M. Gatti, “Opinion 1/17 in Light of *Achmea*: Chronicle of an Opinion Foretold?” *European Papers*, Vol.4, No.1 (2019), pp.109-121.

⁵⁷ E. Stoppioni, “L’audience dans l’avis 1/17 sur le CETA”, <https://blogdroiteuropeen.com/2018/06/29/audience-dans-lavis-1-17-sur-le-ceta-par-edoardo-stoppioni/>.

⁵⁸ Opinion 1/17, § 106-161.

⁵⁹ Opinion 1/17, § 179: “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

situation of a Canadian investor in the EU and an EU investor changing member state cannot be compared. In the absence of likeness of situations, there can be no possible discrimination.

Regarding the last point, the Court considered that, concerning the right of access to an independent tribunal, the guarantees of Article 47 of the Charter of Fundamental Rights were in principle respected. The Court strongly relied on the textual improvements of the independence of the members, as opposed to the old investment arbitration system, as well as on the guarantees put forward by the Council on the future improvement of access for medium- and small-size enterprises.⁶⁰

2. An Acceptance Based on a High Degree of Formalism

We see that what is common to all three points is a certain degree of formalism that the Court used to validate the ICS compatibility without seriously delving into the more complicated issues raised in the CETA agreement. We will focus here on the first point, whose theoretical strength seems particularly disturbing.

The Court considered that the applicable law by the ICS did not put in danger the autonomy of the EU legal order. Concerning this point, there are three fundamental arguments in the Opinion: (1) The applicable law by the ICS is only the treaty text and public international law, as established in Article 8.31 CETA; (2) Internal law of member states and EU law is taken into consideration only as a fact; (3) Therefore, there is no further need for coordination mechanisms between the ICS and the ECJ, such as preliminary references.

Now, the idea that the applicable law is limited to public international law only is quite simplistic. Arbitral case law shows that this kind of provision raises difficulties. In ECT cases, for instance, where we have a similar applicable law situation, investment tribunals have shown the complexity of the issue. They considered EU law as public international law specialized *ratione materiae*, which the tribunal could take it into consideration.⁶¹ What if ICS case law starts considering that the EU treaties are public international law treaties and can therefore be applied?

It is true that Article 8.31(2) of the new text tries to solve the problems, specifying that “for greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of the disputing Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party.” The Court reiterated in the Opinion the position of the Council and of the Commission, which both defended the idea that, while in an *Achmea* configuration the tribunal could have applied domestic law as law, here we are in a pure public international law context. Therefore, as the PCIJ recalled in *Certain German Interests in Polish*

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.”

⁶⁰ Opinion 1/17, § 213: “In the absence of rules designed to ensure that the CETA Tribunal and Appellate Tribunal are financially accessible to natural persons and small and medium-sized enterprises, the ISDS mechanism may, in practice, be accessible only to investors who have available to them significant financial resources.” However, the Council has undertaken to ensure that “there will be better and easier access to this new court for the most vulnerable users.”

⁶¹ Think about the awards in *Electrabel* or *Ekosol*.

Upper Silesia, “from the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts.” Again, this reasoning seems too formalistic for different reasons.

First, this argument is considered insufficient and criticized in public international law scholarship since at least 1938.⁶² Jenks and Virally wrote that it would be “a mistake to attach undue importance” to the PCIJ’s pronouncement, as the line between treating this material as law or fact was “perilously indeterminate.”⁶³ WTO case law, for instance, clearly demonstrated how difficult it is for the AB to distinguish between questions of facts and law when there is an appeal on issues concerning domestic law before WTO judges.

Second, investment arbitration practice shows that, even if domestic law is to be considered simply as a fact, sometimes the judicial function of the tribunal pushes it to develop a strong standard of review concerning it. Contract claims might require a determination of whether the contract was lawfully terminated under domestic law, and denial of justice claims might require the tribunal to verify a local court judgment’s consistency with domestic law.⁶⁴

During the hearing, AG Bot questioned the parties on this binary opposition law/fact that he seemed to consider unsatisfactory. Judge Ilesic raised an interesting point: if a defendant state were to raise the Charter of Fundamental Rights before the ICS as a defense, would it not be an example of how complicated it would be for the ICS to not consider that, even if EU law is a fact, it is a fact of a peculiar kind and its normativity creates more subtle problems?

Always during the hearing, President Lenaerts and Judges Silvia de Lapuerta and Ilesic had asked the parties to explain how the lack of coordination mechanisms could not be a problem. Indeed, CETA only provides for an obligation to take into consideration the already-occurred allocation of damages. Is there not a risk that the ICS becomes an arena for appeal against the decisions of the ECJ? If the Court has decided a preliminary reference a point necessary for the proceedings before the ICS, is the ICS bound by this assessment? These were important questions, raising real problems of the applicable law issues, and I have the feeling that the Court did not properly address them with its formalism.

VII. Conclusion

The story of the interactions between EU law and international investment law is complex and multi-faceted. In the first set of case law, the ECJ had tolerated international arbitration just because it was a consensual dispute settlement mechanism mutually agreed by merchants, operating at the margins of the EU legal system. When the ECJ encountered a specific type of arbitration based on BITs and opposing an investor to a sovereign state, the reaction was less one of tolerance by exclusion than of rejection. The *Achmea* case lies at the heart of this movement of refusal.

More recently, nevertheless, the Court has accepted an evolution in EU treaty practice,

⁶² J. Hepburn, *Domestic Law in International Investment Arbitration* (Oxford University Press, 2017).

⁶³ C.W. Jenks, “The Interpretation and Application of Municipal Law by the Permanent Court of International Justice,” *BYIL* (1938), p.68; M. Virally, “The Sources of International Law,” in M. Sorensen (ed.), *Manual of Public International Law* (London: Macmillan, 1968), p.171.

⁶⁴ J. Hepburn, “CETA’s New Domestic Law Clause,” *EJIL: Talk!* <https://www.ejiltalk.org/cetas-new-domestic-law-clause/>.

moving away from arbitration but including in FTAs a reformed form of ISDS. These jurisdictions would not endanger the autonomy of the EU legal order, contrary to the old ISDS mechanism. If the reasoning of the Court is surprising and extremely formalistic, the result really is not. The Court decided to opt for the choice that advances the EU external economy, exports, and investment attraction.

The ECJ seems to progressively nuance its initial philosophical approach, enshrined in the *Nordsee* case, according to which EU law and arbitration would be two worlds apart. The nuances had started with the limit of public policy set in the *Eco Swiss* case, where a progressive climax started, leading to Article 351 TFEU cases and above all the *Achmea* case. The Court has realized that a Manichean approach, according to which both systems can function in splendid isolation, is not possible. Nevertheless, the attitude of rejection of the Court also functioned based on a pattern of isolation: investment arbitration is rejected from the EU legal sphere, being declared contrary to the most fundamental EU procedural law principles, a rejection that is based on an inward-looking consideration of the autonomy of EU law. In Opinion 1/17, the Court remains attached to an approach of formalism, not of delving into the peculiarities of international investment law. The result is one of strong formalism.

Similarly, investment tribunals have reacted to *Achmea* stressing dualism and distinguishing of normative spheres. The case law on the interactions between EU law and international investment law is, therefore, a good example of the continuity of a fragmentation posture in the international legal order today.

In the absence of a serious dialogue, many questions remain unanswered for the future. Will investment tribunals ever take into account the *Achmea* judgment, at least in intra-EU investment disputes that have started after it pronounced? Will the different scenario that this entails for state consent be focused on? Will the CETA tribunal adhere to the textual guarantees that the ECJ praised in Opinion 1/17? Or will we face another line of fragmentation of legal regimes? All these questions show that this Kabuki play will not finish here.