The Aftermath of Achmea: A Broader Impact on International Dispute Resolution?

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The Achmea judgment has predominantly been analysed within the confines of intra-EU investment arbitration, both in case law and legal scholarship. This article moves beyond that narrow scope to explore its broader implications for international dispute settlement. Although the ruling is formally limited to intra-EU investment arbitration, it raises structural concerns regarding the compatibility of other international tribunals with the EU legal order—particularly in light of the CJEU's exclusive jurisdiction under Article 344 TFEU. The Court's reasoning, which treats investment tribunals as infringing upon EU judicial autonomy due to their potential application of EU law, risks generating inconsistencies in how the EU approaches other international dispute resolution mechanisms. Through a comparative analysis of the jurisprudence of the International Court of Justice and the WTO Dispute Settlement Body, this article shows that international tribunals frequently engage with domestic law interpretatively without threatening legal autonomy. It concludes that if the logic of Achmea were applied consistently, it would cast doubt on the legitimacy of numerous international adjudicatory bodies, thereby undermining the coherence of the EU's relationship with international law and dispute resolution.

Introduction

The issuance of the *Slovak Republic v. Achmea B.V*[1] ("Achmea") judgment and the subsequent reactions by the EU Member States was a significant development for the legal community. In Achmea, the Court of Justice of the European Union ("CJEU") held that intra-EU investment arbitration was incompatible with the EU treaties. The case reached the CJEU through enforcement proceedings before a German court, which questioned the award's compatibility with EU law. Following this, on 5 May 2020, 23 Member States signed an agreement terminating their intra-EU bilateral investment treaties.[2] While Achmea may have seemed narrowly relevant- limited to intra-EU investment arbitration—it nonetheless raised critical questions regarding the recognition and enforcement of arbitral awards in non-EU jurisdictions. In this context, the recent ruling[3] by the U.S. Court of Appeals for the D.C. Circuit is particularly significant, as its reasoning may influence how third states approach the enforcement of intra-EU arbitral awards.

Beyond its implications for investment arbitration, *Achmea* may also have broader consequences for international dispute resolution mechanisms outside the EU judicial framework. The CJEU's reasoning rested on the idea that investment arbitration tribunals, which derive their jurisdiction from BITs—international agreements between states—necessarily apply EU law when resolving disputes arising under these treaties, thereby violating EU law. However, this logic is not unique to investment disputes. Other international tribunals, including the ICJ, frequently refer to domestic laws as interpretative tools in resolving international disputes. Similarly, in non-investment international arbitration, tribunals may rely on domestic legal principles in ways that mirror the arguments used by the CJEU to declare arbitration clauses in BITs incompatible with EU law. This raises a fundamental question: if the EU maintains other forms of international dispute resolution while rejecting investment arbitration tribunals, does *Achmea* create an inconsistency within the EU's legal framework?

This article will examine the potential ramifications of *Achmea* beyond investment arbitration, particularly its implications for other international dispute resolution mechanisms.

[1] CJEU, *Slovak Republic v. Achmea B.V.*, Case C-284/16, Judgment of 6 March 2018.

[2] *Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union*, 5 May 2020, O.J. 2020 (L 169) 1, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01) (accessed 15 April 2025).

[3] U.S. Court of Appeals (D.C. Cir.), *Blasket Renewable Investments LLC v. Kingdom of Spain*, 112 F.4th 1088 (2024).

I. Exclusive Jurisdiction of the CJEU

The CJEU ensures uniform interpretation and enforcement of EU law, with the authority to annul national laws that contradict EU treaties (e.g. see Articles 218, 259, 260 of the TFEU).[4] As the ultimate authority within the EU legal system, it ensures legal coherence. Article 344 Treaty on the Functioning of the EU ("TFEU") prohibits Member States from resolving disputes regarding the interpretation or application of the EU Treaties through mechanisms other than those established within the Treaties themselves (see paragraph 63 of the *Opinion 1/09 on the Legality of a Unified Patent Litigation System)*.[5] The CJEU's exclusive jurisdiction is well-established.[6]

II. The Court's Arguments in Achmea

Achmea marked a landmark ruling in which the CJEU first established that arbitration clauses in intra-EU BITs were incompatible with EU law. While not binding on investment tribunals, this decision significantly impacted investor-state arbitration under the 196 intra-EU BITs. The CJEU held that arbitration under the Netherlands-Slovak BIT conflicted with the European legal order and was therefore inapplicable.

The Court reasoned that an arbitral tribunal constituted under a BIT could not be equated with an EU Member State court and, as a result, lacked the ability to request a preliminary ruling from the CJEU.

Effectively, it found that even when ruling on BIT violations, such a tribunal must consider the national law of the contracting state (i.e., the Member States) and other international agreements between the contracting parties, including EU law (see paragraph 40 and on). Since EU law is an integral part of each Member State's national legal order and derives from an international agreement among them, the tribunal may be required to interpret and apply EU law. Given that the arbitral tribunal established under a treaty would inevitably interact with EU law although operating outside the EU judicial framework, that would violate Article 344 of the TFEU, CJEU's exclusive jurisdiction and its role in ensuring the uniform interpretation of EU law, as it lacks the authority to submit preliminary questions to the CJEU.

III. Fundamental Questions Arising from Achmea

The *Achmea* ruling gives rise to two fundamental questions. First, what does it mean for an international tribunal's jurisdiction to overlap with that of the EU? Can it truly be said that an arbitral tribunal established under a BIT performs the functions of the CJEU and undermines its exclusive jurisdiction? Even if the substantive investment protection provisions under a BIT govern the same subject matter as EU law, does an arbitral tribunal's adjudication amount to adjudication on EU law?

The answer to this question should be negative. If a subject matter is regulated both in EU law and an international treaty, this does not change the fact that the international treaty constitutes an independent body of norms. In this respect, an international court does not examine the domestic dimension of an international legal norm. It does not assess its domestic application within a solely domestic context. Even when examining domestic applications, it does so in relation to the international legal norm, not the domestic legal rule. It treats international law as a distinct legal order, separate from domestic law. For instance, when the ICJ reviews a state's compliance with a treaty that it has incorporated into its domestic law, it does not analyze the treaty as a part of that state's internal legal order but rather from the perspective of international law. Similarly, in international law, courts do not examine whether states have complied with their internal constitutional procedures for the adoption of treaties, as per VCLT Article 27.[7] Instead, once a state has validly become a party to an international treaty following the procedures set out in that treaty, it is bound by it under international law, even if the treaty has not been fully incorporated into its domestic legal system. The fact that this happens demonstrates that international courts do not engage with the internal dimension of legal rules but rather interpret them within their international context.

This understanding has implications for the interpre-

[4] *Treaty on the Functioning of the European Union*, Consolidated Version, 9 May 2008, O.J. 2012 (C 326) 47.

[5] CJEU, *Opinion 1/09 on the Legality of a Unified Patent Litigation System*, Judgment of 8 March 2011.

[6] D. MAESTRO, *Regulating Jurisdiction Collisions in International Law: The Case of the European Court of Justice's Exclusive Jurisdiction in Law of the Sea Disputes*, Mich. J. Int'l L. 41/2020, p. 563 ff., available at: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2099&context=mjil (accessed 15 April 2025).

[7] *Vienna Convention on the Law of Treaties*, 23 May 1969, entered into force 27 January 1980, United Nations Treaty Series, vol. 1155, p. 331.

tation of Article 344 TFEU. The mere fact that a matter is regulated both in EU law and an international treaty does not mean that an international dispute settlement body is adjudicating the dispute in accordance with EU law. Accordingly, Article 344 TFEU should not be interpreted in a way that prevents an international court or tribunal from adjudicating disputes under international law simply because EU law also regulates the subject.

A. Implications for International Dispute Settlement

Another question that arises is whether an investor-State arbitral tribunal violates Article 344 TFEU when it interprets substantive provisions of a BIT and, in doing so, occasionally relies on EU law as an interpretative tool or for evidence. Given that the ICJ and WTO dispute settlement bodies also occasionally refer to domestic law for the same functions, should it be concluded that they are also in violation of EU law?

International courts, even when resolving disputes strictly under international law, often engage in interpreting domestic legal provisions.[8] This reflects the widespread practice of using national law as an interpretative tool in the application of international law.

The World Court has evolved from its initial position that domestic law is merely a fact in international law to recognizing that it can play a role in the formation and application of international legal rules. In its *Frontier Dispute (Burkina Faso/Niger)*[9] judgment in 2013, the Court relied on a French colonial administrative order to determine the land boundary between the two states, as explicitly required by a prior agreement. This was not a direct interpretation of domestic law, but an application of colonial administrative law as mandated by the treaty. *In Jurisdictional Immunities of the State (Germany v Italy)*,[10] the Court examined domestic court rulings from several European states to interpret Article 31 of the European Convention on State Immunity, particularly regarding whether state immunity applies to armed forces. While these national decisions were not treated as binding legal sources, the Court used them as tools of interpretation, persuasive support for its conclusion. In its *Aegean Sea Continental Shelf*[11] case in 1978, the ICJ used domestic law to interpret a multilateral treaty reservation. The case involved a dispute between Greece and Turkey over the continental shelf entitlements of Greek islands. Greece invoked a reservation in the General Act for the Pacific Settlement of International Disputes, which excluded disputes related to the territorial status of Greece. The Court emphasized that this reservation should be understood as two separate categories of dispute. To interpret this reservation, the Court referred to Greek domestic law (See *Judgment*[12], paragraphs 66-67), specifically the legal documents and explanatory notes (See *Aegean Sea Continental Shelf, Pleadings,* paragraph 296) from Greece's ratification of the General Act. The ICJ's reliance on Greek domestic law to understand the reservation made by Greece shows how domestic law can play a crucial role in interpreting international law, even in the context of multilateral treaties. This practice is not unique to this case but is common in international dispute resolution, where domestic laws may be referenced to clarify the intentions of states regarding international commitments.

Just like in the ICJ's use of domestic law in interpreting international law, domestic law has had a restricted influence in the reasoning of the WTO dispute settlement mechanism. Although the WTO panels and Appellate Body have consistently emphasized that the provisions of the covered agreements refer to autonomous concepts, separate from the domestic law of any individual member state, domestic law has still had a limited role in the decision-making process, often when it is raised by one of the parties involved in the dispute. For instance, in *Section 110(5) of the US Copyright Act*,[13] the Panel utilized domestic law as evidence of the subsequent practice of states parties to a treaty. This is pertinent under Article 31(3)(b) of the Vienna Convention, as it demonstrates a "concordant, common, and consistent" series of actions that are sufficient to establish the agreement of the parties concerning the interpretation of the treaty.

The aforementioned international dispute resolution mechanisms, when adjudicating matters of international law, may rely on domestic law as a supplemen-

[8] D. PEAT, *Domestic Law in the Jurisprudence of the International Court of Justice*, in: D. Peat/M. Tzanakopoulos (eds.), *Comparative Reasoning in International Courts and Tribunals*, Cambridge 2019, p. 49 ff.

[9] ICJ, *Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013.

[10] ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012.

[11] ICJ, *Aegean Sea Continental Shelf (Greece v. Turkey),* Judgment of 19 December 1978.

[12] *ibidem*.

[13] WTO DSB, *United States – Section 110(5) of US Copyright Act*, Dispute DS160.

tary source in their legal reasoning. They interpret domestic legal facts and rules in a way that support specific claims and justifications. Whether through references to domestic law embedded in international agreements or by utilizing judicial decisions, administrative rulings, or legislation without explicit reference to domestic law, these mechanisms draw upon domestic legal sources, interpreting them to substantiate their reasoning. Indeed, since these sources are employed as instruments of justification or evidence, it becomes inevitable that they are interpreted with some degree of legal analysis.

This raises the question of whether there exists a distinction between the approaches of international courts or quasi-judicial bodies as the WTO and those of arbitral investment tribunals, particularly in their occasional recourse to domestic law when interpreting BITs.

Mechanisms for the protection of investments—ranging from Bilateral Investment Treaties (BITs) to national regulations and investment contracts—differ in the scope and nature of the substantive legal protections they afford. However, in cases where the Court of Justice of the European Union (CJEU) has found investment arbitration tribunals to be incompatible with EU law, the jurisdiction conferred upon such tribunals through arbitration clauses has consistently pertained to the substantive protections established under BITs or the Energy Charter Treaty (ECT).

In the Netherlands-Slovakia BIT,[14] Article 8(6) explicitly refers to the domestic legislation of the contracting parties, stating that: *"The arbitral tribunal shall decide on the basis of the law, taking into account, in particular, but not exclusively: The current legislation of the Contracting Party concerned..."* However, even in such cases, the reference to domestic law within the BIT pertains to the application of the treaty's provisions[15] concerning the protection of foreign investments—namely, the substantive protections enshrined in the BIT itself. Thus, domestic law is not applied as an autonomous body of law but rather in relation to the implementation of BIT provisions. For instance, an arbitral tribunal may need to interpret domestic legal provisions to assess whether a contracting party has complied with the Fair and Equitable Treatment (FET) standard.

In this regard, the reliance on domestic law in the context of BITs or multilateral investment instruments such as the ECT does not materially differ from the approach adopted by international courts and quasi-judicial bodies, which similarly engage with domestic law as an interpretative tool in the application of international legal standards.

Both international courts and investment tribunals use domestic legal sources to clarify treaty provisions, establish factual backgrounds, and interpret legal standards within an international framework. This functional reliance on domestic law does not equate to its direct application as an autonomous body of law. Investment tribunals, in particular, may assess domestic legal provisions to determine compliance with investment protection standards, just as international courts consider national laws to interpret state obligations under treaties.

Therefore, an arbitral tribunal's reference to EU law does not inherently contradict Article 344 TFEU. Instead, such references serve as interpretative aids within the broader framework of international law, distinguishing them from direct adjudication under EU law. The mere use of EU law as an interpretative tool does not transform an investment dispute into an EU law dispute, nor does it undermine the coherence of the EU legal order as protected by the CJEU.

B. Implications for Non-Investment International Arbitration

Like investment arbitration tribunals, other international arbitration tribunals—such as those handling commercial or civil disputes—are not state tribunals. Consequently, in some jurisdictions, such as France, they are unable to request a priority question of constitutionality before the Constitutional Council, as established by the French Court of Cassation in a decision[16] dated 28 June 2011. Furthermore, they cannot refer questions to the Court of Cassation or the Conseil d'État for transmission to higher courts.[17] More

[14] *Netherlands–Slovakia BIT (1991)*, Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic, available at: https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2650/netherlands---slovakia-bit-1991- (accessed 15 April 2025).

[15] *Applicable Law in Investment Treaty Arbitration*, Yulchon LLC, *The Investment Treaty Arbitration Review*, 7th ed., 15 June 2022, available at: https://www.lexology.com/library/detail.aspx?g=441aa2f2-935b-4c54-b6c8-f4e9f4c06eec (accessed 15 April 2025).

[16] Cour de cassation (France), Commercial Chamber, No. 10-19.331, Judgment of 28 June 2011 (unpublished).

[17] *IBA Arbitration Committee Arbitration Guide – France*, updated March 2024, available at: https://www.ibanet.org/document?id=France-country-guides-arbitration (accessed 15 April 2025).

relevant to the Achmea conclusions, they lack the authority to submit preliminary questions on EU law to the CJEU just like investor-State tribunals.

This institutional limitation underscores why the reasoning in *Achmea* extends beyond investment arbitration to other forms of international arbitration. Even in non-investment disputes, an arbitral tribunal may be required to interpret and apply EU law when the applicable law governing the substance of the arbitration is a Member State's law or EU law, or when the seat of arbitration is within the EU. Despite this, such tribunals operate outside the EU judicial framework and lack access to the CJEU's interpretative guidance. Consequently, this also reinforces the argument that such arbitral tribunals violate the CJEU's jurisdictional monopoly and the principle of the uniform interpretation of EU law.

Conclusion

Achmea exposes a potential inconsistency in the EU's legal framework. If the CJEU's objection to investment tribunals is based on their incidental reference to EU law, then a comparable critique could be extended to other international tribunals that reference domestic legal systems.

Does the mere fact that investment tribunals may engage with EU law necessarily equate to them exercising interpretative authority over it in a way that undermines the CJEU's exclusive jurisdiction? If such references are made only to provide legal context, rather than to apply EU law as a governing legal order, does this truly constitute a violation of the EU's judicial monopoly? The selective rejection of investment arbitration based on this argument raises concerns about the internal coherence of the EU's legal stance. Achmea's implications might risk extending – at least theoretically- beyond investment arbitration and call into question the EU's broader approach to international dispute resolution mechanisms.