The *Achmea* Case: the Opinion of the Advocate General Wathelet

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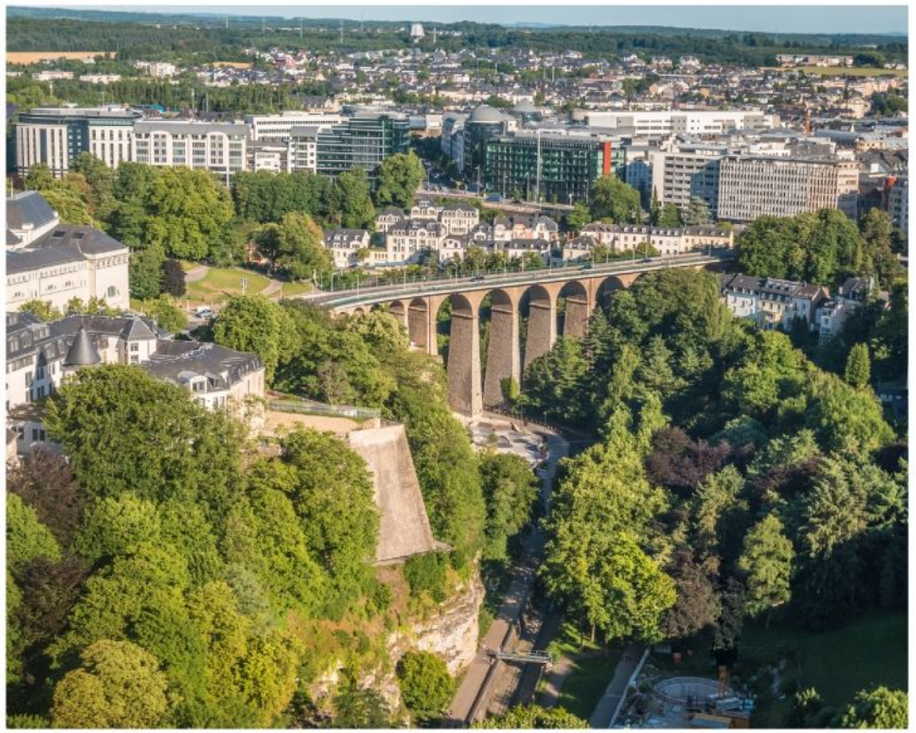
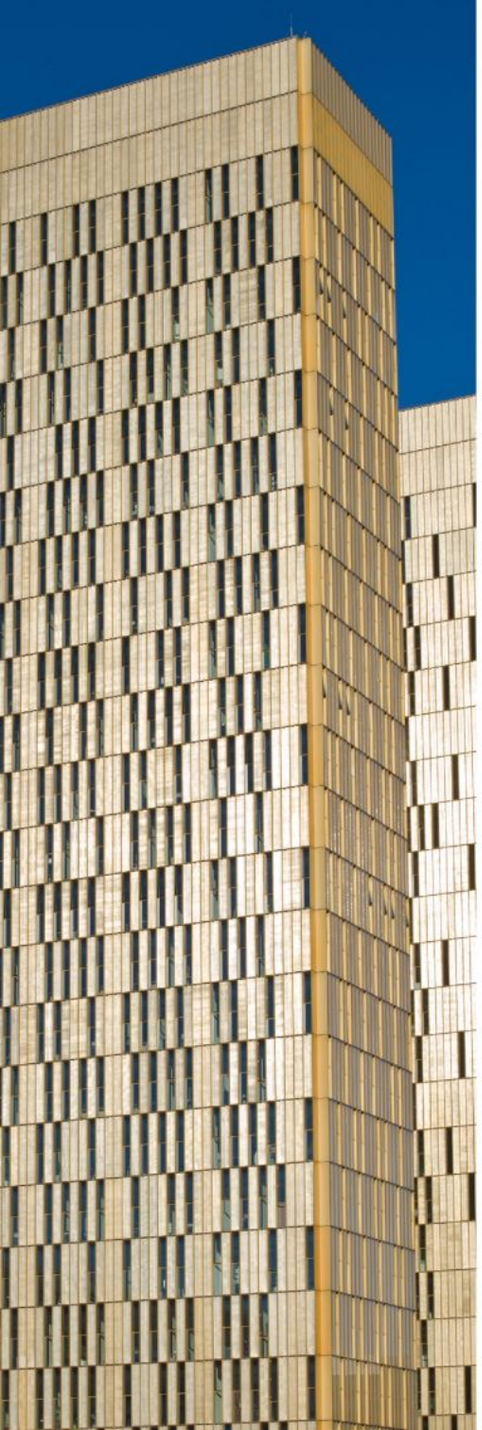
Are Bilateral Investment Treaties ('BITs') between European Union Member States ('intra-EU BITs') compatible with European Union ('EU') law? This is the main question that the German Supreme Court posed to the Court of Justice of the European Union ('CJEU') on 23 May 2016, in the context of an action brought by the Slovak Republic before the German courts seeking the annulment of an arbitral award. The Slovak Republic had implemented specific measures that affected the interests of a foreign investor, an undertaking of a Dutch insurance group, Achmea B.V. (formerly known as Eureko B.V.). An arbitral tribunal seated in Frankfurt am Main, Germany, held that those measures breached the BIT signed in 1991 between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic. The Slovak Republic's central argument in its action for annulment is that the BIT is not compatible with EU law. The CJEU has yet to render its preliminary judgment, but on 19 September 2017 Advocate General Wathelet delivered his opinion.

Three issues were addressed. First, are intra-EU BITs in conformity with the principle of non-discrimination on grounds of nationality enshrined in Article 18 of the Treaty on the Functioning of the European Union ('TFEU')? General Advocate Wathelet answered in the affirmative. To justify his position, the Advocate General relied on the CJEU's case law on double taxation treaties signed by Member States. The Court has maintained that the fact that the rights and obligations created by such treaties apply only to persons resident in the two contracting Member States is an inherent consequence of the treaties. The





Advocate General has now claimed that the same is true of intra-EU BITs.

The second issue relates to the preliminary ruling procedure established in Article 267 of the TFEU. May arbitral tribunals created under the authority of a BIT request preliminary rulings from the CJEU? Are they to be regarded as '*a court or tribunal of one of the Member States*' within the meaning of Article 267?

Over the years, the CJEU has specified and clarified the features that an adjudicative body must possess before it can be regarded as a court or tribunal of a Member State: the body must be established by law; it must be permanent; its jurisdiction must be compulsory; and it must apply the law in an independent and impartial manner. In general, arbitral tribunals have not been found to meet all these requirements. Although arbitrators usually resolve disputes in accordance with the law, and they do so as independent and impartial adjudicators, they are not established by law, they are not permanent, and their jurisdiction is not compulsory. The CJEU, however, has held that some special types of arbitral tribunals do qualify as courts. For example, this was so in the *Ascendi* case (C-377/13), where the court concluded that the Portuguese *Tribunal Arbitral Tributário* was of a judicial nature. In his opinion in the *Achmea* case, the Advocate General put forward the view that investor-state arbitral tribunals are also special. They are established by law (the relevant BIT), and not by a contract between the parties. They are permanent: even if each arbitral tribunal is ephemeral, they form part of an enduring arbitral system created by the BIT. Their jurisdiction, moreover, is compulsory: because the government has given its prior consent to arbitration by means of the BIT, the jurisdiction of the tribunal is binding. In light of the above, the Advocate General reached the conclusion that arbitral tribunals under the BIT can refer preliminary questions to the CJEU.

The last issue concerned the exclusive jurisdiction of the CJEU, as defined in Article 344 TFEU, which provides that '*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 therein*.' Do intra-EU BITs violate this provision? According to the Advocate General, it is clear from the CJEU's case law that Article 344 covers disputes between Member States, and between Member States and the Union. It does not extend, however, to disputes between individuals, or between individuals and Member States. Arbitral tribunals, moreover, rule on the breaches of the relevant BITs, which scope of protection is wider than that of EU law. Finally, the autonomy of the EU legal order is not at risk, since domestic courts can intervene to preserve EU law at the annulment stage, or at the enforcement stage, and in that context they may request the CJEU to issue preliminary rulings. It must be noted, however, that the Advocate General held that '*Member States should avoid the choice of ICSID in their BITs*,' in order not to shield arbitral awards against national judicial checks.

Advocate General Wathelet's opinion appears consistent with the current legal doctrine of the CJEU. One may doubt, however, whether the Court and the Advocate General have gone in the right direction when they apply the proposition that a court is a '*permanent*' adjudicative body that has '*compulsory jurisdiction*' in such a flexible manner. The better view might be to retain a stricter conception of what a court is and apply Article 267 TFEU by analogy. Arbitral tribunals and courts should be treated in a similar way, for the purposes of the preliminary reference procedure, even if arbitral tribunals are not, strictly speaking, permanent bodies that possess compulsory jurisdiction. The CJEU's decision in the *Achmea* case will likely shed some light on these issues. It is hard to predict, however, whether it will follow Advocate General Wathelet's opinion.

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