Calling a Spade a Spade: are ‘arbitral tribunals’ to be considered tribunals in light of recent EU case law and the USSC’s judgment of 13 June 2022?

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The debate as to the legal nature of arbitral tribunals is not a new one. Since the Court of Justice of the European Union (‘CJEU’) issued its landmark decision in *Achmea*[1], a great many judgments have followed. One of them has recently returned the matter to the centre of legal debate, albeit in a very different context and around a very different problem. We are referring to the judgment of 13 June 2022 issued by the United States Supreme Court (‘USSC’) in relation to United States Statute, Section 1782 (a) of Title 28 (‘§ 1782’), in which the USSC limited the recourse to discovery from which some international arbitrations had been benefitting (‘Judgment’). The USSC concluded unanimously that the reference to ‘foreign or international tribunal’ in § 1782, which had given rise to a circuit split, only encompassed governmental or quasi-governmental bodies and therefore excluded arbitral tribunals. The two debates vary in their approach, content and depth, but they concur on the need for a body to have a sort of ‘government spine’ to qualify as a tribunal.

Achmea, Komstroy and *PL Holdings*

The triad of *Achmea, Komstroy*[2] and *PL Holdings*[3] analyses – each to a greater or lesser extent – whether an arbitral tribunal qualifies as a tribunal for the purposes of Article 267 of the Treaty on the Functioning of the European Union (‘TFEU’).

Much has been written about *Achmea*, which declared an arbitration clause in an international investment agreement (‘IIA’) concluded between two Member States incompatible with EU law. To the surprise of the *Bundesgerichthof*[4] itself[5] and contrary

1 CJEU, Case C-284/16, *Slovak Republic v Achmea BV* (6 March 2018) ECLI:EU:C:2018:158.
2 CJEU, Case C-741/19, *Republic of Moldova v Komstroy LLC* (2 September 2021) ECLI:EU:C:2021:655.
3 Case C109/20, *Republiken Polen v PL Holdings Sàrl* (26 October 2021) ECLI:EU:C:2021:875.
4 The Federal Court of Justice is Germany’s highest court of civil and criminal jurisdiction.
5 CJEU, Case C-284/16, *Slovak Republic v Achmea BV* (6 March 2018) ECLI:EU:C:2018:158, para 14.

Home

Editorial

Insight
Calling a Spade a Spade: are ‘arbitral tribunals’ to be considered tribunals in light of recent EU case law and the USSC’s judgment of 13 June 2022?

Global Briefing
Review of the Award in *Green Power Partners K/S and SCE Solar Don Benito APS v the Kingdom of Spain*

Brazil’s Decision to Stay Outside the Investment Arbitration World and Reliable Alternatives for Foreign Investors

An Overview of Investment Disputes Involving the Colombian State: lessons learned

Can El Salvador Bridge the Worlds of Cryptoassets and Investment Arbitration?

In Focus
One of the Many Aspects of Diversity in International Arbitration: the Role of Women

Disputes in the Era of Meta Worlds: the role of arbitration

See You in The Metaverse, Mr Arbitrator

‘Humanising’ Arbitration: the interplay between human rights and arbitration in recent European Court of Human Rights case law

Investment Arbitration: Contact Lawyers

www.uria.com

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to the conclusions reached by Advocate General Wathelet,[6] the CJEU considered the arbitration agreement to be contrary to EU law on the grounds that an international agreement cannot violate the order of competences established by the treaties or the autonomy of the EU legal system.[7] It is within this framework that the system for referring requests for preliminary rulings – which is 'conceived [...] as [the] keystone [of the] [...] judicial system'[8] – is responsible for guaranteeing the uniform interpretation of EU law.

In this context, the CJEU considered whether an arbitral tribunal – which must interpret or apply that law – could be considered 'a jurisdictional body' for the purposes of Article 267 TFEU and it concluded it could not. The CJEU underlined 'the exceptional nature of the tribunal's jurisdiction [...] [which is] not part of the judicial system of the Netherlands or Slovakia,[9] the fact that it 'is not [...] a court common to a number of Member States',[10] and the limited control of its decisions, which depends on the law applicable to the proceedings. As Professor Ferreres Comella[11] points out, the CJEU's position on this issue 'leads to an unsatisfactory state of affairs' given that it shifts all the onus on to national judges to ensure the correct application of EU law, with the consequent delay that this entails. Professor Ferreres Comella contemplates allowing arbitrators to refer questions to the CJEU either directly or through an ordinary court. He also notes that exceptionally arbitrators could be required to refer questions of validity to the CJEU if they consider that an EU law or decision is invalid.[12]

Even though in *Achmea* the CJEU was not in favour of classifying the ad hoc arbitral tribunal in question as a judicial body, the CJEU has accepted preliminary ruling referrals from arbitral tribunals in other cases: *Handels-og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening*[13] as regards the Industrial Arbitration

6 Case C-284/16, *Slovak Republic v Achmea BV* Opinion of Advocate General (19 September 2017) ECLI:EU:C:2017:699.
7 Case C-284/16, *Slovak Republic v Achmea BV* (6 March 2018) ECLI:EU:C:2018:158, para 35.
8 Ibid, para 37.
9 CJEU, Case C-284/16, *Slovak Republic v Achmea BV* (6 March 2018) ECLI:EU:C:2018:158, para 45.
10 Ibid, para 48.

11 V. Ferreres Comella, *The Constitution of Arbitration* (Cambridge University Press: 2021), pp 79-80.
12 Ibid p. 80: 'The CJEU has a monopoly when it comes to declaring the invalidity of European Union Acts. See Judgment of 22 October 1987, C-314/85 *Foto-Frost* case.'
13 Case C-109/88 *Handels-og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening* (17 October 1989) ECLI:EU:C:1989:383.

Home

Editorial

Insight
Calling a Spade a Spade: are 'arbitral tribunals' to be considered tribunals in light of recent EU case law and the USSC's judgment of 13 June 2022?

Global Briefing
Review of the Award in *Green Power Partners K/S and SCE Solar Don Benito APS v the Kingdom of Spain*
Brazil's Decision to Stay Outside the Investment Arbitration World and Reliable Alternatives for Foreign Investors
An Overview of Investment Disputes Involving the Colombian State: lessons learned
Can El Salvador Bridge the Worlds of Cryptoassets and Investment Arbitration?

In Focus
One of the Many Aspects of Diversity in International Arbitration: the Role of Women
Disputes in the Era of Meta Worlds: the role of arbitration
See You in The Metaverse, Mr Arbitrator
'Humanising' Arbitration: the interplay between human rights and arbitration in recent European Court of Human Rights case law

Investment Arbitration: Contact Lawyers

Board, given that its jurisdiction did not depend on what the parties agreed; *Parfums Christian Dior SA and Parfums Christian Dior BV v Evora BV*[14] as regards the Benelux Court of Justice; and *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v Autoridade Tributária e Aduaneira*,[15] in which the CJEU ruled that the *Tribunal Arbitral Tributário* could refer preliminary ruling requests given its legal origin, compulsory jurisdiction, permanence and independence.

The conclusion reached in *Achmea* was limited in scope to investment arbitration, and therefore excluded commercial arbitration. Nevertheless, it did settle the question in relation to multilateral international treaties. The immediate consequence of the ruling was that 23 Member States signed the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union of 5 May 2020, which put an end to all the IIAs affected by it and prevented others from being signed in the future.[16]

In *Komstroy*, the CJEU extended its approach to intra-European arbitrations arising from the Energy Charter Treaty ('ECT'). After confirming it had jurisdiction, and following the conclusions of Advocate General Szpunar, the CJEU considered that disputes between one Member State and an investor from another Member State cannot be resolved through ad hoc arbitration under the ECT, as this is an act of EU law and 'does not constitute a component of the judicial system of a Member State.' As such, a request for a preliminary ruling could not be made to the CJEU. In *Komstroy*–where the analysis of the nature of the arbitral tribunal was secondary–the CJEU followed its approach in *Achmea*, highlighting that the arbitral tribunal was outside the EU judicial system, 'the exceptional nature of that court's jurisdiction' and the limited judicial review of the award.[17]

According to the CJEU, the fact that an arbitral tribunal does not constitute a component of the judicial system of a Member State could prevent disputes from being resolved in a manner which ensures that EU law has full effect, even though those disputes might concern the interpretation or application of that law. It also noted that even if the law of the Member State provides that national courts may review the arbitral award, since such a review is limited and can take place only to the extent permitted by national law, there is no guarantee that the autonomy of the EU legal order will be protected.

The CJEU also pointed out that the arbitration proceedings in *Komstroy* differed from commercial arbitration proceedings. Whereas the latter originate in the freely expressed will of the parties concerned, investment arbitration proceedings arise from a treaty whereby Member States agree to forego the jurisdiction of their own courts and, hence, the system of judicial remedies that should apply to disputes concerning the application or interpretation of that law.

These same jurisdictional arguments were recently upheld for the first time by an ad hoc arbitral tribunal in *Green Power Partners K/S and SPE Solar Don Benito APS v The Kingdom of Spain*.[18]

The CJEU set another milestone in intra-European investment arbitration with its judgment in *PL Holdings*,[19] in which it clarified that intra-European IIAs are contrary to EU law regardless of their specific legal basis. The CJEU concluded that an ad hoc arbitration agreement with EU-based investors that replicated the content of an arbitration agreement in an IIA was contrary to EU law. Otherwise, Member States could use this to circumvent their obligations under EU treaties, as interpreted in *Achmea*.[20] The CJEU took into account the risk of a 'pull effect' since adopting such a legal approach could quickly become commonplace. It also indicated that the principle of legal cooperation, as well as

14 Case C-337/95, *Parfums Christian Dior SA and Parfums Christian Dior BV v Evora BV* (4 November 1997) ECLI:EU:C:1997:517.
15 Case C-377/13, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA v Autoridade Tributária e Aduaneira* (12 June 2014) ECLI:EU:C:2014:1754.

16 See E. Arnaldos and J. Lamas, 'Intra-European Union Investment Protection: What Now?' *8 Investment Arbitration Outlook*, p 19.

17 CJEU, Case C-741/19, *Republic of Moldova v Komstroy LLC* (2 September 2021) ECLI:EU:C:2021:655, paras 51, 52, 55-56.

18 See D. Sarmiento, J. de Castro, S. Green Martínez and J. Gallel, 'Review of the award in *Green Power Partners K/S and SCE Solar Don Benito APS v the Kingdom of Spain* (SCC Arbitration v (2016/135))' in this issue.
19 Case C109/20, *Republiken Polen v PL Holdings Sàrl* (26 October 2021) ECLI:EU:C:2021:875.
20 Ibid, para 47.

the Agreement of 5 May 2020,[21] which obligates Member States to question the validity of arbitration clauses in intra-European IIAs, must be applied *mutatis mutandis* to arbitration agreements.

When considering the nature of arbitral tribunals, Advocate General Kokott goes through the general features that the CJEU considers to determine whether a body qualifies as a court or tribunal for the purposes of Article 267 TFEU and thus as part of the EU judicial system: 'whether they are permanent, whether their jurisdiction is compulsory, whether their procedure is *inter partes*, whether they apply rules of law and whether they are independent.' In the case at stake, both Advocate General Kokott and the court pointed out the 'lack of compulsory jurisdiction' of the arbitral tribunal and the fact that it was not part of the judicial system of a Member State, as well as its exceptional character.[22] However, Advocate General Kokott stressed that, as outlined in *Achmea* and later in *Komstroy*, this approach does not apply to commercial arbitrations. According to the Advocate General,[23] the difference is that commercial arbitration between individuals has its origin in the parties' autonomy, while investment arbitration results from a treaty between Member States.[24] She added that in order for a dispute to be admitted, it must be

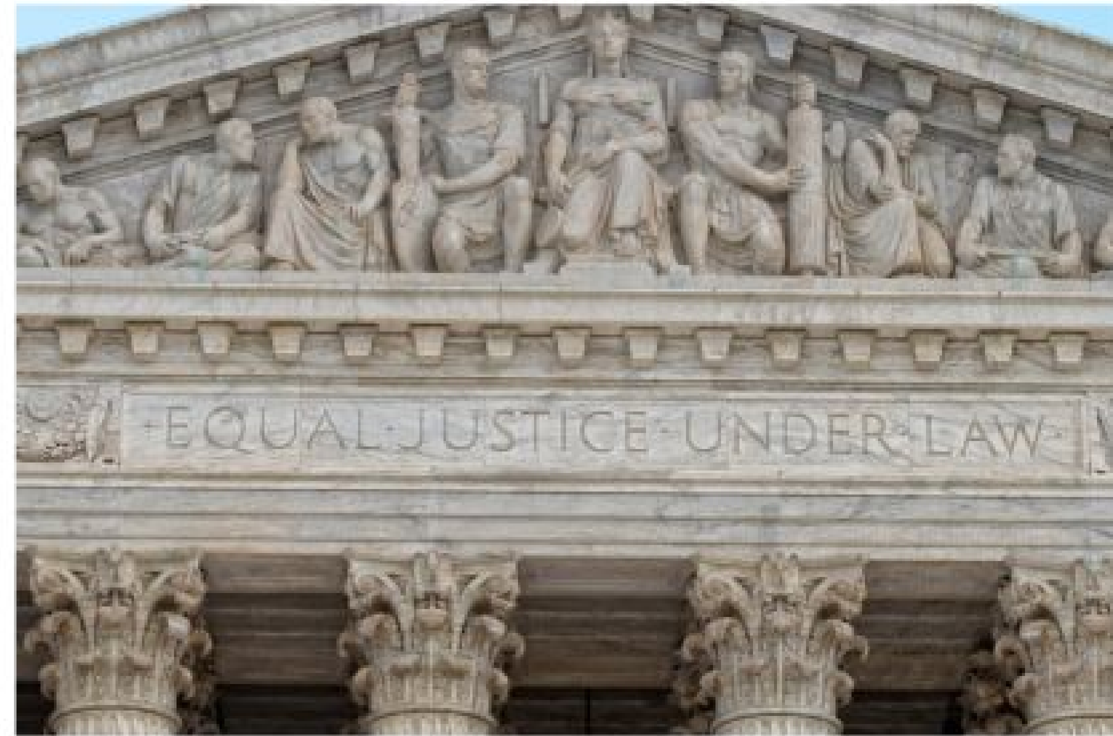
21 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22020A0529(01)&from=EN> accessed 26 September 2022.
22 Case C109/20, *Republiken Polen v PL Holdings Sàrl* Opinion of Advocate General (22 April 2021) ECLI:EU:C:2021:321, para 36.
23 Ibid, para 43.
24 Ibid, para 47.

'between parties in an equal position.'[25] Ultimately, the CJEU concluded that the arbitral tribunal is not a 'jurisdictional body of one of the Member States' and therefore that it is not empowered to request a preliminary ruling from the CJEU.

USSC judgment of 13 June 2022

A similar discussion about the legal nature of the arbitral tribunal – although more focused on international commercial tribunals – has been ongoing in the United States for many years, albeit in terms of access to discovery in the United States when the arbitration is conducted abroad rather than about the arbitral tribunal's jurisdiction. Indeed § 1782,[26] captioned 'Assistance to foreign and international tribunals and to litigants before such tribunals, authorises district courts to order testimony or the production of documents or things 'for use in a

25 Ibid, para 52.
26 '(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.'



proceeding in a foreign or international tribunal.' Historically, the Circuit Courts of Appeals were split on whether or not 'foreign or international tribunals' included private commercial arbitral tribunals. The Second, Fifth and Seventh Circuits held that commercial arbitration tribunals are not 'tribunals' for the purposes of § 1782,[27] while the Fourth and Sixth Circuits held that private arbitral tribunals are within the scope of the US Statute.[28] This uncertainty encouraged tremendous forum shopping. The USSC had remained silent as to the scope of § 1782 after issuing its landmark decision on the broad scope of the US Statute in *Intel Corp. v Advanced Micro Devices, Inc.*[29] While the USSC was due to decide on this issue back in December 2020 when it agreed to hear Servotronics' appeal in its dispute with Rolls-Royce,

27 *National Broadcasting Company, Inc. v Bear Stearns & Co., Inc.*, 165 F.3d 184 (2d Cir. 1999); *Republic of Kazakhstan v Biedermann International*, 168 F.3d 880 (5th Cir. 1999); and *Servotronics, Inc. v Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020).
28 *Servotronics, Inc. v The Boeing Company; Rolls-Royce Plc*, 954 F.3d 209 (4th Cir. 2020) and *Abdul Latif Jameel Transportation Co. Ltd. v FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019)

29 *Intel Corp. v Advanced Micro Devices*, Inc. - 542 U.S. 241, 124 S. Ct. 2466 (2004), the USSC held that § 1782 authorises, but does not require, a federal district court to provide judicial assistance to foreign or international tribunals or to interested persons in proceedings abroad. It also stated that the European Commission '[w]as a § 1782 tribunal in part because it was a 'first-instance decision maker' that rendered dispositive rulings reviewable in court.' The fact that the European Commission has governmental authority was undisputed.

On both sides of the Atlantic there seems to be a shared idea that for a body to be deemed a 'tribunal' it must be empowered with specific governmental *potestas*, which the arbitral tribunals in the mentioned cases were deemed not to have

Servotronics announced in September 2021 that it would withdraw the appeal.

The USSC finally took up this question, granting *certiorari* and consolidating two cases in which a party applied for discovery assistance under § 1782 in arbitration proceedings: *ZF Automotive US, Inc. v Luxshare, Ltd.* and *AlixPartners, LLP v The Fund for Protection of Investors' Rights in Foreign States*.

In the first case, the Hong Kong-based company Luxshare Ltd sought discovery under § 1782 from ZF Automotive US, Inc., a Michigan subsidiary of a German corporation from which it bought two companies. Luxshare Ltd found out that ZF Automotive US, Inc. had concealed information about the business units it had acquired and applied for discovery for use in an arbitration under the Arbitration Rules of the German Institution of Arbitration (DIS). The district court granted Luxshare's application and ordered discovery. ZF moved to quash, but the district court denied ZF's motion. The Sixth Circuit denied a stay.

The second case concerns AB bankas Snoras, a Lithuanian bank that was nationalised by the Lithuanian government and declared insolvent as a result of fraud perpetrated by its majority shareholders. A Russian fund that purportedly assigned the rights of one of those principal shareholders, a Russian national, commenced an UNCITRAL arbitration[30] against Lithuania pursuant to a bilateral investment treaty between Russia and Lithuania. After initiating arbitration, the claimant in this case filed a § 1782 application seeking information from a temporary administrator of Snoras and from AlixPartners, LLP, a NY consulting firm where this administrator served as CEO. AlixPartners, LLP resisted discovery, arguing that the ad hoc arbitration panel was not a 'foreign or international tribunal' under § 1782 and instead a private adjudicative body. The district court rejected that argument and granted the fund's discovery request. The Second Circuit upheld this.

Justice Barrett, writing for a unanimous court, ruled that only a governmental or intergovernmental adjudicative body constitutes a 'foreign or international tribunal' under § 1782 and concluded that none of the arbitral panels in the reviewed cases qualified as such given that they lacked governmental authority. The USSC relies on corpus linguistics to analyse the meaning of the word 'tribunal', which Congress added to § 1782 in 1964 (a previous version covered 'any judicial proceeding' in 'any court in a foreign country'). That shift allowed for US judicial assistance in administrative and quasi-judicial proceedings abroad. The USSC pays particular attention to the use of 'foreign' and 'international' as modifiers of the word 'tribunal'.[31] The adjective 'foreign' could have been used to mean belonging to another nation or country –with a clear governmental body connotation – or it could more generally mean 'from' another country – which would extend to private adjudicative bodies too. According to the USSC, 'the word "foreign" takes on its more governmental meaning when modifying a word with potential governmental or sovereign connotations' which is 'tribunal'.[32] 'Foreign tribunal' would refer to a tribunal belonging to a foreign country, meaning that it possesses 'sovereign authority conferred by that nation'. This reading is also supported by the statutory defaults for discovery procedure under § 1782, which permit district courts to prescribe the practice and procedure 'which may be in whole or part the practice and

30 The treaty offered the parties four options for dispute resolution and the fund chose an ad hoc arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law, with each party selecting one arbitrator and those two choosing a third. The treaty also provided that the arbitral decision would be final and binding for both parties to the dispute.

31 'If we had nothing but this single word [tribunal] to go on, there would be a good case for including private arbitral panels, Judgment, p 6.

32 'In everyday speech, the phrase "foreign leader" denotes an official of a foreign state, not a team captain of a European football club. So, too, "foreign or international tribunal" most naturally refers to the judicial or quasi-judicial body of a "foreign" country, or an "international" state-to-state commission or similar adjudicatory body established by two or more nations—not a group of football referees discussing a penalty on the pitch' Brief for United States as Amicus Curiae 17.

procedure of the foreign country or the international tribunal' for taking testimony or producing evidence. The fact that the default discovery procedures are governmental would suggest, according to Barrett, that the body is governmental too. Likewise, an 'international tribunal' would involve or belong to two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes. Therefore, a 'foreign tribunal' would be a tribunal imbued with governmental authority by one nation, and an 'international tribunal' would be a tribunal imbued with governmental authority by multiple nations (without giving any examples).

This interpretation is confirmed by both the US Statute's history and a comparison with the Federal Arbitration Act ('FAA'), 9 U.S.C. From 1855 until 1964, § 1782 and its antecedents covered assistance only to foreign 'courts.' When Congress established the Commission on International Rules of Judicial Procedure, it charged the Commission with improving the process of judicial assistance 'between the United States and foreign countries' which lead to the modern version of § 1782. The purpose of this modification was to foster international comity, promoting 'respect for foreign governments and encourag[ing] reciprocal assistance' and not enhancing 'an expansion from public to private bodies.' Furthermore, extending § 1782 to include private bodies would create a remarkable mismatch between foreign arbitration and domestic arbitration regulated under the FAA, which only allows the arbitration panel to request discovery (9 U.S. Code § 7) and does not allow pre-arbitration discovery.

With these observations, the USSC considered that neither of the 'private adjudicative bodies' in question counted as a foreign or international tribunal for the purposes of § 1782. In *Luxshare* – where the analysis was considered 'straightforward'[33] – the USSC considered that the arbitral panel did not qualify as a governmental body given that it operated under its own private rules and was composed by parties with no governmental involvement in its creation or in its procedures. This was regardless of the fact that 'the law of the country in which it would sit governs some aspects of arbitration' and that 'courts play a role in enforcing arbitration agreements.' In *AlixPartners, LLP* – which posed a 'harder question'[34] – the USSC considered the fact that nothing in the treaty between Russia and Lithuania indicates that the parties intended that the panel should have governmental authority: the treaty does not itself create the panel,[35] the tribunal was not affiliated with either Lithuania or Russia, the members of the panel did not have any official affiliation with Lithuania, Russia or any other governmental or intergovernmental entity, and there were no other indicia of a governmental nature. The USSC found no difference between the DIS panel in *Luxshare* and the ad hoc panel in *AlixPartners, LLP*, given that in both cases 'the panel derives its authority from the parties' consent to arbitrate.' The ad hoc tribunal existed because the claimant and defendant consented to the arbitration, not because Russia and Lithuania conferred the panel with governmental authority. The fund tried to support its case by analogising to past adjudicatory bodies which qualified as intergovernmental: the body at issue in the dispute over the sinking of the Canadian ship *I'm Alone*, which derived from a treaty between the United States and Great Britain and the United States-Germany Mixed Claims Commission. The USSC found significant differences between these two and the ad hoc panel, such as that the treaties to which these two bodies refer establish that each sovereign state would be involved in the formation of the bodies.[36] In conclusion, 'foreign or international tribunal' under § 1782 refers to a governmental or intergovernmental adjudicative body exercising 'governmental authority conferred by one nation or multiple nations.' Neither of the arbitral tribunals in the consolidated cases qualify.

Conclusions

The two approaches to the concept of the arbitral tribunal share some elements.

The EU case law – which only concerns investment arbitration cases

33 Judgment, p 12.
34 Judgment, p 12.
35 '[I]t simply references the set of rules that govern the panel's formation and procedure if an investor chooses that forum, Judgment, p 14.

36 '[...] [W]ith respect to the treaty creating the Mixed Claims Commission in particular, it also specified where the commission would initially meet, the method of funding, and that the commissioners could appoint other officers to assist in the proceedings, Judgment, p 16.

– establishes a set of elements that must be taken into account to assess whether an arbitral tribunal qualifies as a 'jurisdictional body' for the purposes of Article 267 TFEU: 'whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.'[37] Whether the body is common to a number of Member States (i.e. its 'international character') is another factor that the CJEU may consider, as it did when qualifying the Benelux Court of Justice as a jurisdictional body for the purposes of Article 267 TFEU.

The CJEU considers that this analysis seems unnecessary for international commercial arbitration, which stems from the parties' autonomy and not from an IIA.

In contrast, the Judgment considers both commercial and investment arbitrations. The USSC rules out using § 1782 to obtain discovery for use in private commercial arbitrations abroad but it does not do so entirely for investor-State arbitral panels. According to the USSC, only one element is required for the investor-State arbitral tribunal to qualify as a court under § 1782: the exercising of governmental authority corresponding to one or multiple nations. Paradoxically, 'governmental nature' is an expression Professor Ferreres Comella uses to describe courts as opposed to arbitral tribunals: 'Courts [...] exercise a governmental power over litigants. Being part of the machinery of the state, courts wield legal "power" (*potestas*).'[38]

The USSC's decision is not totally clear on what it means to possess such 'governmental power.' It only refers to factors that might be considered when analysing whether or not a panel possesses such authority (characteristics that the ad hoc tribunal in *AlixPartners* did not have). For instance, the way the panel is created (pursuant to a treaty or with active State involvement), the rules that govern its formalisation (by reference to a set of predetermined rules or by creating a new set of rules), the way the panel conducts itself (independently or with state affiliation) and 'any other indicia of a governmental nature' such as the funding of the tribunal and State involvement in nominating panel members. The USSC clarifies that '[...] inclusion in the treaty does not [...] automatically render ad hoc arbitration governmental, and concludes that the origin of the arbitral panel in *Snoras* is merely conventional.[39] This differs from the CJEU's approach in *Achmea*, in which it held that the arbitral tribunal (which was provided for in an IIA) originated from a 'legal provision.' That said, both the USSC and the CJEU assign value to the international nature of the body in question.

Be that as it may, the Judgment is ambiguous – perhaps clarity was sacrificed for unanimity – and may set the stage for additional enquiries relating to the application of § 1782 to investor-State arbitral panels. It leaves the door open to other arbitral panels constituted in investor-State cases involving IIAs to qualify as a governmental or intergovernmental body. This could be the case of arbitral tribunals created under the ICSID Convention,[40] which gives arbitral tribunals 'immunity from legal process' and in some cases exempts from tax arbitrators' income from work performed in their capacity as members of a tribunal.[41] That said, the US District Court for the Eastern District of New York recently ruled out this possibility arguing that an ICSID panel is not imbued with any 'governmental authority' and pointing out the similarities between the ad hoc arbitration tribunal in AlixPartners and the ICSID panel in this case.[42]

On both sides of the Atlantic there seems to be a shared idea that for a body to be deemed a 'tribunal' it must be empowered with specific governmental *potestas*, which the arbitral tribunals in the mentioned cases were deemed not to have.

37 Case C-284/16, *Slovak Republic v Achmea BV* Opinion of Advocate General (19 September 2017) ECLI:EU:C:2017:699, para 86.

38 Victor Ferreres Comella, *The Constitution of Arbitration* (Cambridge University Press: 2021), p 9.

39 'In a private arbitration, the panel derives its authority from the parties' consent to arbitrate. The ad hoc panel in this case derives its authority in essentially the same way. Russia and Lithuania each agreed in the treaty to submit to ad hoc arbitration if an investor chose it, Judgment, p 14.

40 <https://www.law360.com/articles/1503897/malta-arb-outside-reach-of-discovery-tool-court-hears> accessed 26 September 2022.

41 ICSID Convention, Arts 21(a) and 24(3), respectively.

42 <https://globalarbitrationreview.com/article/us-court-bars-discovery-icsid-case?utm_source=Chinese%2Bstate%2Bentities%2Btake%2BMaltese%2Bawards%2Bto%2BCalifornia&utm_medium=email&utm_campaign=GAR%2BAlerts> accessed 2 November 2022.

URÍA MENÉNDEZ

Home

Editorial

Insight
Calling a Spade a Spade: are 'arbitral tribunals' to be considered tribunals in light of recent EU case law and the USSC's judgment of 13 June 2022?

Global Briefing
Review of the Award in *Green Power Partners K/S and SCE Solar Don Benito APS v the Kingdom of Spain*

Brazil's Decision to Stay Outside the Investment Arbitration World and Reliable Alternatives for Foreign Investors

An Overview of Investment Disputes Involving the Colombian State: lessons learned

Can El Salvador Bridge the Worlds of Cryptoassets and Investment Arbitration?

In Focus
One of the Many Aspects of Diversity in International Arbitration: the Role of Women

Disputes in the Era of Meta Worlds: the role of arbitration

See You in The Metaverse, Mr Arbitrator

'Humanising' Arbitration: the interplay between human rights and arbitration in recent European Court of Human Rights case law

Investment Arbitration: Contact Lawyers

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