Despite the fact that the Court declared an autonomous right to a healthy environment as fundamental for humanity, it is noteworthy that it did not embark on an assessment of state practice and *opinio juris* and did not expressly recognize the right as customary international law. This was to be expected, as it would go beyond the remit of Colombia's questions. Nevertheless, the strong affirmation by an international human rights tribunal perhaps can be a step toward the future recognition of this right as part of customary international law.

Finally, the Advisory Opinion is of major significance because it clearly links international human rights with international environmental law. The question that is yet to be answered is whether the Court's environmental law approach to human rights obligations can be sustained in practice, to confer clear positive obligations on states to protect the human rights of their people against environmental degradation, and the extent to which it can contribute to the adjudication of contentious cases in international and national courts.

The Advisory Opinion's paramount importance is captured in the loud and clear signal it gives that environmental policies can no longer be separated from human rights obligations and vice versa. As a consequence, the scope for environmental matters before human rights tribunals could be broadened considerably, both in terms of facts and applicable law.

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European Court of Justice—reference for a preliminary ruling—bilateral investment treaties—investment arbitration—relationship between EU law and investment treaties—concept of "court or tribunal" under EU law—autonomy of EU law

SLOWAKISCHE REPUBLIK (SLOVAK REPUBLIC) v. ACHMEA B.V. Case C-284-16. Request for a Preliminary Ruling Under Article 267 TFEU from the German Federal Court of Justice (*Bundesgerichtshof*). *At* http://curia.europa.eu.
European Court of Justice (Grand Chamber), March 6, 2018.

On March 6, 2018, the Grand Chamber of the Court of Justice of the European Union (CJEU or Court) rendered its judgment in *Slowakische Republic (Slovak Republic) v. Achmea B.V.* (*Achmea* decision) in response to the German Federal Court of Justice's (*Bundesgerichtshof*) request for a preliminary ruling.[1] Deciding for the first time on the compatibility of the arbitration provision in bilateral investment treaties (BITs) with European Union (EU) law, the Court concluded that the investor-state arbitration clause in the Dutch-Slovak BIT was incompatible with EU law because it violated the principle of autonomy. The Court will soon respond to Belgium's request for an Opinion on the Canada-EU free trade agreement (FTA), where it will rule on the compatibility of extra-EU investment agreements with EU law.[2]

[1] This Judgment, and the Opinion of the Advocate General Wathelet delivered on September 19, 2017, are available at http://curia.europa.eu (search for "284/16").

[2] CETA: Belgian Request for an Opinion from the European Court of Justice (Sept. 6, 2017), available at https://diplomatie.belgium.be/en/newsroom/news/2017/minister_reynders_submits_request_opinion_ceta.

The *Bundesgerichtshof*'s request for a preliminary ruling posed three questions to the CJEU: (1) Does Article 344 of the Treaty on the Functioning of the European Union (TFEU)[3] (demarcating exclusive jurisdiction over Treaty disputes) preclude investment arbitration pursuant to intra-EU BITs, i.e. BITs in force between two EU member states before EU accession, but where the arbitration claim is filed after EU accession? If not, (2) does TFEU Article 267 (establishing the CJEU's jurisdiction to render preliminary rulings) preclude that application? And if neither of those does, (3) does TFEU Article 18(1) (prohibiting discrimination based on nationality) preclude that application?

The *Bundesgerichtshof* asked these questions while hearing a case initially filed before the courts of Frankfurt to vacate a 2012 UNCITRAL award in *Achmea, B.V. v. Slovak Republic*, which ordered the Slovak Republic to pay to the privately owned, Dutch health provider Achmea B.V. 22.1 million euros in compensatory damages. That dispute arose because between 2007 and 2011, the Slovak Republic restricted distribution of profits from private sickness insurance companies in which the Dutch insurer had invested (para. 8).

The investment arbitration took place pursuant to Article 8 of the BIT between the Netherlands and the Czech and Slovak Federative Republic, adopted in 1991, to which the Slovak Republic succeeded on January 1, 1993 (paras. 3, 6).

The Slovak Republic argued that the arbitral tribunal should reject jurisdiction because the country's accession to the EU on May 1, 2004 voided the consent to arbitration expressed in Article 8(2) of the BIT (para. 11). The arbitral tribunal rejected this argument in an interlocutory award on jurisdiction. The state challenged this interlocutory award, but the German courts upheld it (*id.*). The final award was rendered on December 7, 2012, which the state again challenged, alleging that the arbitration agreement was invalid under the applicable EU law (paras. 5, 12).[4] This time, the case reached the *Bundesgerichtshof*, which referred its three questions to the CJEU (para. 23).

In the judgment, the CJEU noted that the referring court did "not share" the doubts of the Slovak Republic, signaling the referring court's opinion that EU judges would confirm the validity of the investment arbitration agreements contained in intra-EU BITs (para. 14). Nonetheless, the *Bundesgerichtshof* hoped that the CJEU might provide coherent guidelines for the application of intra-EU BITs (*id.*). In fact, CJEU Advocate General Wathelet's opinion in the case agreed with the German court's supposition that the CJEU would not object to the validity of intra-EU BITs.[5]

The CJEU, however, decided against the compatibility of such agreements with the TFEU by holding firmly to the principle of autonomy of EU law (para. 33). This principle is based on TFEU Article 344, which allows only the CJEU itself and the courts of the member states to apply EU law (para. 32). It also stems from Article 19 of the Treaty on European Union (TEU),[6] which mandates that the CJEU and national courts and tribunals ensure the full application of EU law (para. 36), as well as Article 267 TFEU on the preliminary ruling procedure (para. 37).

[3] Consolidated Version of the Treaty on the Functioning of the European Union, as published in O.J. C 326, October 26, 2012, pp. 47–390.

[4] The basis for the application for setting aside the award in this case was Article 1,059(2) of the German Code of Civil Procedure.

[5] *See* Opinion of Advocate General Wathelet, *supra* note 1, paras. 229–72.

[6] Treaty on European Union, as published in O.J. C 326, October 26, 2012, pp. 13–46.

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To answer the *Bundesgerichtshof*'s questions, the Court bundled the two first questions and structured its reasoning around the following issues: (1) whether investment arbitration pursuant to Article 8 of the BIT would entail applying EU law (paras. 39–42); (2) whether the investment arbitration tribunals are situated within the EU's judicial system (paras. 43–49); and (3) if the investment arbitration tribunals' decisions would be subject to appeal before a member state's courts to scrutinize the application of EU law (paras. 50–57). The following summarizes the Court's reasoning on these three issues.

When assessing whether investment arbitration involves application of EU law, the Court looked to Article 8(6) of the BIT, which requires the BIT to be applied in coherence with the domestic law of the host state, as well as other, potentially applicable international agreements (para. 40). The Court concluded from the text of this provision that an investment arbitration tribunal "may be" called upon to apply EU Law, including its fundamental freedoms (para. 42).

The Court dismissed the possibility of considering investment arbitration tribunals as "courts or tribunals of a Member State," as required under TFEU Article 267 (para. 49). The Court acknowledged that the consequence of a positive answer to this question would lead to a fully effective application of EU law (para. 43). Yet the Court characterized the arbitral tribunal's jurisdiction as "exceptional" and concluded that arbitral tribunals "cannot in any event be classified as a court or tribunal 'of a Member State'" (paras. 45–46). The Court distinguished the investment arbitration tribunals from the Benelux Court of Justice (another international tribunal set up between EU member states, which was held to be competent to submit requests for preliminary rulings), because that court's objective was to provide a uniform application of rules which already were assessed before the national courts of justice of the Benelux member states (paras. 47–48).[7]

Lastly, the Court discussed whether investment arbitration awards could be appealed before EU member states' national courts to ensure full compliance with EU law. The Court observed that the German Code of Civil Procedure provided only limited grounds for setting aside of arbitral awards (para. 53). While acknowledging that in previous cases it had held the system for challenging arbitral awards is compatible with EU law when applied to commercial arbitration cases (para. 54),[8] the Court distinguished those cases from the arbitral tribunals set up pursuant to a BIT. The Court explained that commercial arbitration stems from "the freely expressed wishes of the parties," but that investment arbitration derives

> from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which the second subparagraph of Article 19(1) TEU requires them to establish in the fields covered by EU Law. (Para. 55)

Once the Court concluded that the investment arbitration at issue is not equivalent to the exercise of jurisdiction by a court or tribunal of a member state, and that investment arbitration tribunals may apply EU law, the Court considered if this would be compatible with its own jurisprudence about the relationship between the EU judicial system and international

[7] The Court referred to these cases: C-337/95, *Parfums Christian Dior SA and Parfums Christian Dior BV v. Evora BV*, 1997 ECR I-06013, para. 21; and C-196/09, *Miles v. Écoles européennes*, 2011 ECR I-05139, paras. 40–41.

[8] The Court referred to these cases: C-126/97, *Eco Swiss China Time Ltd. v. Benetton International NV*, 1999 ECR I-03055, paras. 35–36, 40; and C-168/05, *Mostaza Claro v. Centro Móvil Milenium SL*, 2006 ECR I-10421, paras. 34–39.

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adjudication (paras. 57–58). The Court recognized that EU member states are allowed to enter into international agreements among themselves providing for international dispute settlement, but only if "the autonomy of the EU and its legal order is respected" (para. 57). The Court also observed that the BIT at issue was adopted by the member states and not the EU itself, calling into question the principle of "mutual trust" between member states and jeopardizing the preservation of the "particular nature" of the law established by the EU Treaties (para. 58). For the Court, such a BIT infringes on the principle of "sincere cooperation" (*id.*). Considering these principles, the Court found the balance weighed against the BIT and in favor of the primacy of the EU Treaties. The Court thus answered that TFEU Articles 267 and 344 preclude the application of the BIT, and that there was no need to address TFEU Article 18 (para. 60).

* * * *

The CJEU's *Achmea* decision is a fundamental—even paradigm-shifting—element of the nascent European case law on investment protection and arbitration. This jurisprudence has become possible because of TFEU Article 207, which was inserted by the 2009 Lisbon Treaty. This provision gave the EU "investment protection" competence as part of the common commercial policy.[9]

It is worth noting that the Court adopted this judgment as a response to a request for a preliminary ruling. Fifteen judges adopted this judgment (the president, a judge-rapporteur, five presidents of Chambers, and eight judges), which contrasts with the twenty-eight judges of the Full Court, which adopted earlier advisory opinions on similar issues involving the relationship of EU law with other legal orders.[10] This may give rise to the argument that the *Achmea* decision lacks the full support and legitimacy of the complete CJEU's bench. The number of judges taking part in the decision becomes even more important in this case, because the member states are divided as to the issue of the compatibility of investment arbitration with EU law.[11] Finally, it is also noteworthy that the Court did not even analyze or discuss the opinion of the advocate general, contrary to its usual practice.

The CJEU's judgment may be analyzed from the perspectives of the two legal orders most directly affected: EU law and international investment arbitration.

From an EU law perspective, the judgment demonstrates the impact of the "principles" of EU law on the Court's jurisprudence.[12] The Court's reasoning, in essence, was that investment arbitration tribunals are not a "court or tribunal of a Member State" as required under TFEU Article 267 for referring requests for a preliminary ruling (para. 46); investment

[9] The CJEU declared this a "shared" competence with the member states; see CJEU, Opinion 2/15, of May 16, 2017, para. 293, on the European Union's competence to conclude and sign the FTA with Singapore.

[10] Opinion 2/13 on the Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:2454 (CJEU Dec. 18, 2014); Opinion 1/91 on the Agreement with the European Economic Area (EEA), 1991 ECR I-6079; and Opinion 1/09 on the Draft Agreement to Create a Uniform European Patent System, 2011 ECR I-01137.

[11] Advocate General Wathelet described this division between member states in his Opinion, based on the intervention of most of them in the proceeding before the CJEU. He explained this division by observing that those member states in favor of compatibility are capital-exporting countries that have rarely been respondents in investment arbitrations, while those opposed receive foreign investment and have been respondents in such arbitrations. See Opinion of Advocate General Wathelet, *supra* note 1, paras. 34–36.

[12] In particular, the judgment referred to the principles of mutual trust, sincere cooperation, and autonomy of EU law (paras. 58–59).

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arbitration "concern[s] the interpretation or application of [EU] [L]aw" (para. 56); and if investment arbitration tribunals are not able to submit requests for preliminary rulings, they cannot "ensure[] the full effectiveness" of EU law and hence violate the principle of autonomy of EU law (*id.*). However, this argument is hardly convincing, since the member states themselves established these tribunals in exercise of their sovereign powers, much as they have established other courts of justice. The Court also failed to explain what it meant by "exceptional nature" of the investment arbitration tribunal's jurisdiction (para. 45).[13] Nevertheless, for the Court, this reasoning sufficed to conclude that the agreement to arbitrate stipulated in Article 8 of the BIT is invalid.

This outcome was not inevitable, since the Court had several alternative paths to legally more coherent and sustainable outcomes: one option would have been to recognize the investment arbitration tribunals as part of the member states' judicial system. Investment tribunals have often been set up to reinforce the independence of judicial review of government conduct where local courts may not be entirely impartial regarding claims by foreign investors. Another option for the Court could have been to emphasize on the contractual nature of the arbitration agreement contained in BITs and accept that states—like private parties—may agree to be respondents in arbitrations to solve a specific dispute. Arbitral awards are only binding in the individual case; they have no *erga omnes* effect, unlike CJEU jurisprudence.

Instead of following either of these paths, the CJEU focused on the principle of autonomy to preserve its monopoly in applying EU law, regardless of the systemic implications for international adjudication through investment arbitration and the position of EU law in international law. In doing so, the Court even lost sight of the fact that a more convincing legal basis for voiding the arbitration clause in the BIT is the inclusion of investment competence into the 2009 Lisbon Treaty and the application of the *lex posterior* principle to the various treaties at hand (i.e. the BITs and the expanded competences of the TFEU after Lisbon). This approach would have endorsed the European Commission's position on investment arbitration that intra-EU investment disputes have to be resolved before EU member states' domestic tribunals due to the superseding power of the EU treaties over the previous investment arbitration regime.[14] The position of the CJEU, however, goes beyond that. The argument that BIT arbitration clauses are invalid because these tribunals may apply EU law and thus violate the principle of autonomy affects any investment arbitration that may apply EU law. This would include any dispute that involves an EU member state as respondent, even if the investor is not a national of the EU. According to the CJEU's position in *Achmea*, these investors would have to claim their rights before their host states' (EU member states') domestic courts, as this is the only way the CJEU could interpret any EU-provision (by way of preliminary ruling). This interpretation invalidates any EU member state involvement with

[13] This position of the CJEU appears to be contrary to the understanding of the U.S. Supreme Court, which has held that "a treaty is a contract, though between nations," and interpreted the arbitration clauses contained in the U.S.-Argentina BIT in the same way as a contract. BG Group plc v. Republic of Argentina, 134 S. Ct. 1198, 1208 (2014).

[14] See, for instance, the recent explanation of the European Commission's position in the decision on state aid regarding Spain's support for renewable energy, which is the factual background for many investment arbitrations held against Spain. European Commission, State Aid SA.40348, Support for Electricity Generation from Renewable Energy Sources, Cogeneration, and Waste, para. 160 (2015/NN, Spain) (including the cases mentioned in notes 65 and 66).

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investment arbitration and may jeopardize the FTA investment arbitration chapters that are currently being negotiated between the European Commission and third countries. The CJEU already has pointed out in its Opinion 2/15 on the FTA with Singapore that the principle of autonomy is applicable to these agreements.[15]

The Court's jurisprudence on the principle of autonomy is also incoherent. While it is applied in *Achmea* to prevent submission to investment arbitration, it is not a hurdle for the World Trade Organization (WTO) dispute settlement mechanism, whose binding interpretation of EU law is generally accepted.[16] In the end, the use of this principle to protect the CJEU's jurisdiction isolates the EU from a potentially rich and dynamic interaction and cross-fertilization with other areas of international law. It is against the internationalist spirit of the European integration process and also risks a backlash from the EU's international partners.

From the investment arbitration perspective, the *Achmea* decision may be disappointing, but it is nothing new. Many courts worldwide set aside or reject enforcement of arbitral awards based on other reasons than the narrow grounds listed in Article 34 of the UN Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration[17] or Article V of the 1958 New York Convention.[18] In these cases, the annulled or rejected awards may still be enforced in other jurisdictions that strictly enforce the New York Convention. For this reason, the Dutch claimant in this arbitration may seek to enforce the award against Slovakia in a non-EU member state upon which the CJEU's judgments are not binding. Such a development is already taking place regarding the first arbitral award annulled on the basis of the *Achmea* decision, in the case of *NovEnergia v. Spain*.[19]

As long as a BIT remains in force, it expresses consent to arbitrate upon which an investor may rely.[20] In the first intra-EU investment arbitration decided after the CJEU's *Achmea* decision, in the case of *Masdar Solar & Wind Cooperatief U.A. v. Spain*, the arbitral tribunal

[15] Although the CJEU considered that it was not called to decide about the compatibility between the investment arbitration provisions and the principles of autonomy. Opinion 2/15, para. 301 (CJEU May 16, 2017).

[16] The CJEU has developed a *sui generis* jurisprudence to accept the binding effect of WTO panel and Appellate Body decisions. In essence, the CJEU held that these decisions are inextricably linked to the contents of the WTO rules (to which the EU is a party), and that any enforcement actions taken by EU institutions of unfavorable WTO decisions are in reality enforcement measures of the WTO rules, without adding obligations not already stated in those rules. *See* Joined Cases C-120/06 P and C-121/06 P, FIAMM and Others v. Council and Commission, 2008 ECR I-6513, paras. 126, 129.

[17] GA Res. 40/72, of December 11, 1985 (as revised in 2006).

[18] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), Art. V, *entered into force* June 7, 1959, 330 UNTS 38.

[19] On May 16, 2018 the Swedish Court of Appeal annulled a February 2018 award in the case of *NovEnergia II – Energy & Environment (SCA), Société d'Investissement à Capital Risque v. Kingdom of Spain*. According to press reports, that court annulled the award on the basis of the CJEU's *Achmea* decision. *See Tribunal de Suecia suspende la ejecución del laudo de NovEnergia contra España por recorte a las renovables*, EUROPA PRESS, MADRID (May 17, 2018), *available at* www.europapress.es (search in the section on "Economy"). The same day of the annulment, the award was submitted to the U.S. District Court for the District of Columbia for confirmation. *See* Case No. 1:18-cv-01148, *available at* www.pacermonitor.com (search for "NovEnergia"). This District Court has not yet taken a decision on the petition to confirm the arbitration award.

[20] Even when a state filed a notice of denunciation or withdrawal, tribunals have required states to arbitrate investor claims literally until the last day the treaty was in force. For instance, in *Venoklim v. Venezuela*, the claimant filed the Request for Arbitration on July 23, 2012, just one day before the lapse of the six-month period after Venezuela's notification to denounce the ICSID Convention. The arbitral tribunal held that the Request for Arbitration was validly filed. *See* Venoklim Holding B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/22, Award, paras. 79–80 (Apr. 3, 2015).

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held the state responsible for violating the Energy Charter Treaty (ECT).[21] The tribunal dismissed Spain's allegation of the invalidity of the ECT's dispute resolution clauses by stating that the CJEU's *Achmea* decision "ha[d] no bearing upon the present case."[22]

In practice, the EU member states will have to denounce their bilateral and multilateral investment protection treaties if they want to remain compliant with the CJEU's interpretation of the EU Treaties. In fact, the Netherlands' Minister for Foreign Trade and Development Cooperation announced in a letter to Parliament on April 26, 2018 that the state will denounce its BIT with Slovakia.[23] He further suggested that other intra-EU BITs should be denounced, that a multilateral agreement should replace these treaties, and that the *Achmea* decision will also affect the Energy Charter Treaty.[24] Until this happens, EU member states that resist arbitration obligations assumed under investment treaties may face claims from the investors' states of nationality. Such claims may be brought before an arbitral tribunal or other dispute settlement procedures or be the subject of diplomatic pressure.[25]

The *Achmea* decision will also impact international investment arbitration more broadly, because it affects the global debate about the future of the investment arbitration system. A growing number of states has become critical with the decentralized and relational nature of investment arbitration, and is proposing a multilateral, permanent investment court system.[26] The *Achmea* decision will soon be followed by the CJEU's opinion on the Canada-EU FTA, which could further reconfirm the holding in *Achmea*. This growing backlash against investment arbitration in Europe demands an effective alternative to investment arbitration. In the meantime, investors in Europe will suffer from uncertainty, higher legal costs, and less legal protection. These consequences are contrary to the very foundational objectives of the EU, which was created to increase legal security and stability throughout the continent.

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[21] Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain, ICSID Case No. ARB/14/1, Award, para. 697, lit. b (May 16, 2018).

[22] *Id.*, paras. 678–83 (especially para. 678).

[23] Caroline Simson, *Netherlands Will Look to Terminate Its EU Investment Pacts*, LAW360 (May 1, 2018), *at* https://www.law360.com/internationalarbitration/articles/1039369/netherlands-will-look-to-terminate-its-eu-investment-pacts.

[24] *Id.*

[25] For instance, the Netherlands-Slovak BIT at issue in the *Achmea* decision provides for interstate arbitration in Article 10, although, according to the CJEU, this may be in violation of TFEU Article 344 when the dispute involves two EU member states. In the recent case of *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, the participation of the Emirate of Abu Dhabi as an investor in a Netherlands' registered claimant company may lead to diplomatic pressure against Spain and/or the EU, as reported in the press shortly after the rendering of the award. *See España pierde su tercer laudo arbitral millonario por el recorte de renovables*, EL PAÍS (May 16, 2018), *at* https://elpais.com/economia/2018/05/16/actualidad/1526488086_008707.html.

[26] *See* Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes, 12981/17, ADD1, DCL1 (Mar. 20, 2018), *available at* http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf.