The conflict of jurisdiction between intra-EU BITs and European Law: Proposal for an EU Investment Court

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Abstract

This work aims to find a practical solution to the problem that exists between intra-EU Bilateral Investment Treaties (BITs) and European Union (EU) law over conflict of jurisdiction issues. Currently, there is a problem as the EU Commission has rendered intra-EU BITs incompatible with EU law. This work argues that the current conflict of jurisdictional problems within investment agreements can be overcome by the creation of an EU investment court. The reliance on this court for the resolution of this conflict, as opposed to private law mechanisms, is important as it is the way forward in handling the conflict of jurisdiction issue at its best.

This work argues that an EU investment court will be a panacea to the current problems concerning the conflict of jurisdiction. These problems will be presented through a positivist method where the law is analysed in its current form, highlighting its current weaknesses and resolving these weaknesses by proposing recommendations for such a court through a comparative examination of other international courts that fulfil a similar dispute resolution function, namely the Organisation for the Harmonisation of Business Law in Africa (OHADA) and the Unified Patent Court (UPC) and the World Trade Organisation (WTO).

The purpose of this work is manifold. The work will provide an analytical examination of the relationship between EU law and international obligations within intra-EU BITs. It will further explore and assess the viability of a range of alternative solutions to intra-EU BITs enforcement within the EU. It will additionally examine the operation of the OHADA, the UPC and the WTO to inform the proposal of an EU investment court. This is important as the outcome of these examinations will support the argument made in this thesis. It will also impact dispute resolution beyond academia by providing a

practical solution to alleviate the current challenges with intra-EU BITs. The recommendations thus can inform changes for *lex ferenda*.[1]

[1] Latin expression for future law.

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List of Abbreviations

AG	Advocate General
BGH	Bundesgerichtshof (Germany's Federal Court of Justice)
BITs	Bilateral Investment Treaties
BLEU	Belgium Luxembourg Economic Union
CAFTA	Central America Free Trade Agreement
CAFTA-DR	Dominican Republic–Central America Free Trade Agreement
CCJA	Common Court of Justice and Arbitration of the Organisation for the Harmonisation in Africa of Business Law
CEE	Central and Eastern Europe
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Community
ECJ	European Court of Justice
ECT	Energy Charter Treaty
EFC	Economic and Financial Committee
EPO	European Patent Office
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GCEU	General Court of the European Union
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICS	Investment Court System

ICSID	International Centre for the Settlement of Investment Disputes
IIAs	International Investment Agreements
ISDS	Investor State Dispute Settlement
ITA	Investment Treaty Arbitration
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organisation
OHADA	Organisation pour l'harmonisation en Afrique du droit des affaires
PCA	Permanent Court of Arbitration
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TIPS	Treaties with Investment Provisions
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UK	United Kingdom
UPC	Unified Patent Court
USA	United States of America
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

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Chapter 1: Rationale for undertaking this research

1.1 Introductory remarks

The late 1990s saw a significant rise in concluding agreements by the signing of BITs with European countries.[2] This followed the collapse of the Soviet Union where many members later joined the EU.[3] In the 1990s, most of the EU Member States from Western Europe signed BITs with the Central and Eastern European (CEE) nations.[4] This included countries such as the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia plus two Mediterranean countries- Malta and Cyprus (commonly known as the 'EU 10') which joined the EU in 2004.[5] Later, Bulgaria and Romania joined the EU and Croatia joined in 2013 (which is now referred to as the so-called EU 13).[6] The accessions of these countries into the EU changed their existing BITs to intra-EU BITs. It also brought to light the issue concerning the compatibility of intra-EU BITs with EU law between the Member States. This is because nations had concluded privatisation agreements with investors, which contained substantial advantages for the investors which could then attract investment into the affected region.[7] Therefore, once these countries acceded to the EU, their existing BITs would need to comply with EU law. This was an issue, as many of their

[2] An example of the treaties concluded were the Treaty of Rome, the 'Maastrict' Treaty on the European Union and the 'Schengen' agreements. This included countries such as Germany, France, Italy, Netherlands, Belgium, Luxembourg, Ireland, United Kingdom, Greece, Spain, Portugal, Austria, Finland, and Sweden.

[3] The Soviet Union collapsed in December 1991, see History, 'Collapse of the Soviet Union' (History, February 2011) <https://www.history.com/topics/cold-war/fall-of-soviet-union#section_4> accessed 5 February 2021. As noted in the Treaty of Accession 2003, the accession to the European Union of Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia took place in 2004.

[4] Cecilia Olivet, 'A Test for European Solidarity: The Case of Intra-EU Bilateral Investment Treaties' (Transnational Institute, January 2013) <https://www.tni.org/files/download/briefing_on_intra-eu_BITs_0.pdf> accessed 1 March 2020.

[5] (n 2).

[6] Europa, 'Eurostat statistics explained- Glossary EU enlargements' (Europa) <https://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:EU_enlargements> accessed 30 October 2020.

[7] Tamás Kende, 'Arbitral Awards Classified as State Aid under European Union Law' [2015] ELTELJ 1, 38.

existing BITs did not comply with EU law due to adverse effects on the autonomy of EU law.

Since the 2004 accession into the EU, the CEE (twelve) countries[8] found that many cases were brought against them by European investors. Up until 2014, approximately, seventy-seven cases were brought against the CEE countries. This included eighteen cases against the Czech Republic, fifteen cases against Poland and ten cases each against Hungary and Slovakia.[9] When compared to cases brought against the Western European countries, only seven cases were initiated against countries such as Germany, Spain, Belgium, Portugal, United Kingdom (UK), Finland, France, Ireland, Italy, Luxembourg, Netherlands, Denmark, Sweden and Austria.[10] According to the Investor to State Dispute Settlement (ISDS), sixty-five per cent (fifty cases) of disputes were initiated by European investors against the CEE countries.[11]

This has been a problem because CEE countries are being sued by European countries and some have been brought due to the demand of the European Commission to comply with EU law. Therefore, this work will examine this problem and will undertake that examination in chapter five.

This chapter will introduce the research by outlining the problem with jurisdiction between intra-EU BITs in section 1.2.1, examining the research question that will drive this work, in section 1.9, identifying and discussing the rationale for this question in the

[8] Cyprus, Estonia, Hungary, Poland, the Czech Republic, Slovenia, Bulgaria, Latvia, Lithuania, Malta, Romania and Slovakia.
[9] European Commission, 'Investor to State Dispute Settlement: Some facts and figures' (European Commission, 2015) <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf> accessed 9 September 2017.
[10] Ibid.
[11] Cecilia Olivet, 'A Test for European Solidarity: The Case of Intra-EU Bilateral Investment Treaties' (*Transnational Institute*, January 2013) <https://www.tni.org/files/download/briefing_on_intra-eu_BITs_0.pdf> accessed 1 March 2020.

same section and provide a chapter outline for the structure of the presentation of the thesis that this work argues in section 1.10 as well.

1.2 An overview of the factors that have caused the problems with jurisdiction over intra-EU BITs

The next section discusses the factors that have both precipitated and motivated the problems with jurisdiction concerning intra-EU BITs. These are the conflicts between EU law and international law obligations contained within intra-EU BITs which will be discussed in section 1.2.1, the premature termination of intra-EU BITs by States who view them as outdated, which will be discussed in section 1.3 and the insistence by the EU that States should terminate their agreements without the EU itself working out an appropriate regulatory framework that can multilaterally address investment relations in the EU will be addressed in section 1.4.

1.2.1 The conflict between EU law and international law obligations

Pre-2004, the European Commission endorsed BITs as a desirable form of protecting investments from EU countries into CEE countries.[12] The European Commission observed that BITs were aimed at "reassuring investors who wanted to invest in the future of the 'EU 13' at a time when private investors, sometimes for historical political reasons, might have felt wary about investing in those countries."[13] The EU 13 is used in reference to the thirteen countries that accessed the single market following the

[12] Marek Wierzbowski and Aleksander Gubrynowicz, 'Conflict of Norms Stemming from Intra-EU BITs and EU Legal Obligations: Some Remarks on Possible Solutions' in Christina Binder and Christoph Schreuer (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009).

[13] European Commission, 'Commission asks Member States to terminate their intra-EU bilateral investment treaties' (European Commission, 18 June 2015) < https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_15_5198/IP_15_5198_EN.pdf> accessed 15 February 2019.

enlargements of 2004, 2007, and 2013.[14] Through these BITs, foreign investors benefited from substantive treaty protections such as Fair and Equitable Treatment (FET) in international arbitration.[15] This resulted in a large number of BITs being signed between the existing EU 13 Member States and the extra-EU CEE countries.[16] However, following the enlargements of 2004, 2007, and 2013, the once extra-EU 13 States joined the single market along with their pre-accessing BITs, which were transformed overnight into intra-EU BITs, bringing the total number of intra-EU BITs to 190.

The only intra-EU BITs in force before 2004 were the Germany-Greece and Germany-Portugal BITs, none of which would amount to an Investment Treaty Arbitration (ITA)[17]. Both agreements were concluded before Greece and Portugal acceded to the EU in 1981 and 1986.[18] In addition, both intra-EU BITs did not present any challenges for the European Commission because they were between three developed nations that could guarantee the substantive protection standards incorporated within the BITs. However, with the accession of the EU 13, comprising mainly of developing CEE countries, the chances of cases being brought by foreign investors pursuant to BITs for breach of the substantive protection standards increased significantly. This was because the decisions made by the EU forced CEE countries to take specific measures as the contractual rights awarded by CEE countries to Western European

[14] Cyprus, The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia acceded in 2004, whilst Bulgaria and Romania joined the EU in 2007; Croatia joined in 2013; for commentary see Hanno Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?' [2009] ICLQ 297.
[15] Also included are national treatment, most favoured nation and Investor state dispute mechanism where companies are permitted bring cases to international tribunals (by passing the national justice system) where they feel their profits have been affected. See Catharine Titi, 'International Investment Law and the European Union: Towards a New Generation of International Investment Agreements' [2015] EJOIL 639, 651.
[16] The term Extra-EU is used in reference to countries outside the European Union.
[17] Currently, there are almost 200 intra-EU BITs.
[18] Germany and Greece BIT 1961 and Germany and Portugal BIT 1980.

investors were restricted. As a result, the investors attempted to invalidate the EU Commissions' norms and decisions which failed and were later brought to the International Centre for Settlement Investment Disputes (ICSID) or arbitrations under the United Nations Commission on International Trade Law (UNCITRAL) rules. Therefore, post-2004, the European Commission changed its view in that it believed that since the accession of the EU 13, the existing agreements should no longer play a part regarding Foreign Direct Investment (FDI) and these agreements potentially lead to an infringement of EU provisions.[19] The European Commission challenged the existing BITs with CEE countries and argued that the Member States should renegotiate their existing agreements or terminate them to avoid discrimination.[20]

The European Commission's fears materialised less than two years later when the ICSID tribunal in *Micula v Romania*,[21] ordered the State to compensate a foreign investor for denial of State aid, despite the argument by the State that such aid was illegal under EU law. Similar cases followed, challenging the argument that EU law superseded international law,[22] in the process causing a power struggle between both systems of governance.[23] This power struggle derives from the principle of *pacta sunt servanda*[24] where the Member States will find it difficult to comply with their EU membership obligations and obligations under international law. It requires that all

19 Marc Bungenberg and Christoph Herrmann, Common Commercial Policy after Lisbon (1st edn, Springer-Verlag Berlin Heidelberg 2013) 238.

20 Ibid.

21 ICSID Case No. ARB/05/20 *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, Award (11 December 2013).

22 ICSID Case No. ARB/07/22 *AES Summit Generation Limited and AES-Tisza Erömü Kft v The Republic of Hungary*- The arbitral tribunal in *AES v. Hungary* refused to give EU law supremacy over the Hungary-UK BIT; SCC Case No. 088/2004 *Eastern Sugar B.V. v The Czech Republic*; ICSID Case No. ARB/07/19 *Electrabel S.A. v Republic of Hungary;* PCA Case No. 2008/13 *Achmea B.V v The Slovak Republic* (formerly *Eureko B.V. v The Slovak Republic*).

23 As discussed earlier, this research focuses primarily on the power struggle between EU law and the international law obligations under BITs. Limited consideration is given to investment treaties in relation to what EU Member States have with extra-EU states, (the so-called extra-EU BITs), because EU law has little or no bearing on them.

24 Latin for "agreements must be kept".

legally binding agreements must be performed. The common principle of *pacta sunt servanda* [25] should be acknowledged and the Member States will struggle to simultaneously comply with their EU membership obligations and the obligations under international law if the *Achmea* judgment is applied to multilateral treaties. The principle makes certain that treaty obligations must be carried out in good faith and States should take the required steps to ensure the obligation is met. This causes an issue for EU investors as they cannot rely on intra-EU cases as they may be declared incompatible, and investors may seek to arbitrate in non-EU States which are not bound by EU law.

1.3 An increased reliance by the EU that their regional law supersedes international law

The European Commission has appeared before courts and tribunals on behalf of EU Member States, through *amicus curiae*,[26] to support the EU position.[27] The European Commission's intervention is guided by two arguments. First, it argues that following the enlargements, "such extra reassurances [became] unnecessary" since all 28 Member States have the same EU rules on cross-border investments including freedom of establishment and the free movement of capital. Intra-EU BITs, on the other hand, grant rights exclusively to contracting parties, on a bilateral basis, thus excluding investors from other non-party States, which constitutes a violation of the non-discrimination prohibition under Article 18 Treaty on the Functioning of the European Union (TFEU, also known as the Treaty of Lisbon), and impacts on the

[25] This principle was explicitly referred to in Article 26 of the Vienna Convention on the Law of Treaties where it stated, 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'.
[26] An impartial advisor who is not a party to the court but believes that the courts' decision may affect its interests. Amicus curiae dates to the early seventeenth century.
[27] See Jorge E.Viñuales, 'Amicus Intervention In Investor-State Arbitration' (2007) 61 DRJ 72.

harmonisation of EU law.[28] Second, the European Commission argues that the Member States, subject to Article 351 TFEU,[29] have an obligation to remove any incompatibilities between agreements. However, Article 351 TFEU applies only to pre-accession thus excluding post-accession treaties. For this reason, the Court of Justice of the European Union (CJEU) in cases against Finland, Austria and Sweden found that these Member States had violated Article 351 TFEU by retaining provisions in their extra-EU BITs that were incompatible with EU law.[30]

Both arguments were put forward in *Eastern Sugar v Czech Republic*[31] where the respondent State argued that; i) the enactment of the decrees was a mandatory requirement under EU law; ii) they were necessary to meet the non-discrimination requirement under Article 18 TFEU; iii) EU law obligations superseded those under international investment treaties.[32]

The respondent State also referred to Article 59 Vienna Convention on the Law of Treaties (VCLT), arguing that both Treaties addressed the same subject matter and since Czech Republic's accession to the EU in 2004, the relevant BIT became inapplicable.[33] The principle of *lex posterior*[34] under Article 59 VCLT is usually cited alongside Article 351 TFEU as it requires the Member States to take actions where there is an incompatibility between EU law and a previous treaty. However, the Czech Republic quoted a January 2006 letter from the European Commission stating: "where

[28] See Christophe von Krause, 'The European Commission's Opposition to Intra-EU BITs and its Impact on Investment Arbitration', (Kluwer Law International Arbitration Blog, 28 September 2010) < http://arbitrationblog.kluwerarbitration.com/2010/09/28/the-european-commissions-opposition-to-intra-eu-BITs-and-its-impact-on-investment-arbitration/> accessed 16 May 2018.
[29] Consolidated Version of the Treaty of Lisbon [2007] OJ C306/01.
[30] Case C-205/06 *Commission v Austria* [2009] ECR I-01301; Case C-249/06 *Commission v Sweden* [2009] ECR I-01335*;* Case C 118/07 *Commission v Finland* ECR I-10889.
[31] SCC Case No. 088/2004 *Eastern Sugar B.V. v The Czech Republic*, Partial award 27 Mar 2007). The arbitration was conducted under the UNCITRAL Rules.
[32] George A Bermann, 'Navigating EU Law and the Law of International Arbitration', [2012] 28 AI 397, 429.
[33] SCC Case No. 088/2004 *Eastern Sugar B.V. v The Czech Republic* paras 100-101.
[34] Latin for "a later law repeals an earlier (law)".

the EC Treaty or secondary legislation are in conflict with some of these BITs' provisions…. Community legislation will automatically prevail over the non-conforming BIT provisions" and "intra-EU BITs should be terminated in so far as the matters under the agreements fall under Community competence."[35] The Czech Republic added that "a Member State may not exercise rights granted under an earlier agreement to the extent that such exercise conflicts with obligations under the [TFEU] Treaty".[36] The respondent State claimed that the tribunal lacked jurisdiction in the matter.

The investment tribunal rejected all the respondent State's arguments. It rejected the view that the non-discrimination principle under Article 18 TFEU could be used to justify a breach of the BIT. The tribunal found that despite several similarities, the most fundamental provisions provided under the BIT such as the FET, compensated expropriation and a dispute settlement mechanism were not reflected under EU law on cross-border investment protection.[37] The tribunal argued that the BIT was not superseded by EU law, because neither the BIT nor TFEU explicitly mentions it thus failing to meet the requirements under Article 59 VCLT.[38] The Czech Republic's mere accession to the EU did not automatically mean the BIT was superseded and by virtue of it being in force, jurisdiction remained with the arbitral tribunals.[39]

1.4 A mandate by the EU for States to terminate their BITs

This triggered a response from the European Commission calling on all States to terminate their intra-EU BITs. The tribunal rejected the argument that the CJEU held

[35] *SCC Case No. 088/2004 Eastern Sugar B.V. v The Czech Republic* para 119.
[36] Ibid.
[37] George A Bermann, 'Navigating EU Law and the Law of International Arbitration', [2012] 28 AI 397, 433; *SCC Case No. 088/2004 Eastern Sugar B.V. v The Czech Republic* paras 159-160, 164-165 & 167-168.
[38] SCC Case No. 088/2004 *Eastern Sugar B.V. v The Czech Republic*, Partial award 27 Mar 2007 paras 143-175.
[39] Ibid, paras 172 and 181.

a monopoly over the interpretation of EU law.[40] In addition, the argument of incompatibility was put to the arbitral tribunal in *Achmea v The Slovak Republic*[41] but was unsuccessful for the following reasons: (i) intra-EU BITs provide wider investment protections than EU law, (ii) there was no incompatible provision for protecting an investment under intra-EU BITs and EU law, and (iii) there was no intention on the part of the Member States to derogate from the application of intra-EU BITs.[42]

Subsequent arbitral tribunals have maintained this position. The decisions on four investor-state arbitral disputes under an intra-EU BIT have been recently rendered against the Czech Republic; *Anglia Auto Accessories*,[43] *Busta*,[44] *WNC Factoring* (all March 2017) and *A11Y* (February 2017) and the European Commission appeared as *amicus curiae* to question the issue of jurisdiction.[45]

In *Anglia Auto* and *Busta* cases, the Stockholm Chamber of Commerce arbitral tribunals rejected the argument that the UK-Czech Republic BIT did not apply following the Czech Republic's accession to the EU.[46] The tribunals also argued that EU law does not offer most protections found in BITs, therefore the intra-EU BITs could not have been superseded by virtue of having the same subject matter.[47] The rejection of

[40] Ibid para 134.
[41] PCA Case No. 2008/13 *Achmea B.V v The Slovak Republic* (formerly *Eureko B.V. v The Slovak Republic*).
[42] Lucian Ilie, 'What is the future of Intra-EU BITs', (Kluwer Arbitration Blog, 21 January 2018) <http://arbitrationblog.kluwerarbitration.com/2018/01/21/future-intra-eu-BITs/> accessed 16 March 2018).
[43] SCC Case No. V2014/181 *Anglia Auto* Accessories Ltd v The *Czech Republic* 10 March 2017.
[44] SCC Case No. V2015/014 IP *Busta* and another v The *Czech Republic* 10 March 2017.
[45] SCC Case No. V2014/181 *Anglia Auto* Accessories Ltd v The *Czech Republic* 10 March 2017 SCC Case No. V2015/014 IP *Busta* and another v The *Czech Republic* 10 March 2017; PCA Case No. 2014-34 *WNC Factoring Ltd v The Czech Republic* 22 February 2017. The concept of amicus curiae is based on the legal foundation concerning the duty of sincere cooperation owed by Member States of the European Union vice versa. This links to the duties within Article 4 of the TEU which imposes negative and positive duties on Member States.
[46] SCC Case No. V2014/181 *Anglia Auto* Accessories Ltd v The *Czech Republic* 10 March 2017 para 128, SCC Case No. V2015/014 IP Busta and another v The Czech Republic 10 March 2017 para 128.
[47] SCC Case No. V2015/014 IP Busta and another v The Czech Republic 10 March 2017 para 114.

the jurisdiction arguments put forward by the European Commission prompted a more destructive measure involving the termination of BITs.

According to the European Commission, BITs between the Member States contain serious incompatibilities with EU law.[48] In particular, they imply discrimination among EU investors and, furthermore, they provide for investor-to-state arbitration of a binding character which is not subject to review by the CJEU on issues of the interpretation of EU law. Based on these and other legal arguments, Member States have been requested to terminate intra-EU BITs.[49] Furthermore, the European Commission has played a key part as they attempted to dispense with intra-EU BITs by urging all EU Member States to terminate their intra-EU BITs. It was argued that intra-EU BITs were incompatible with EU law.

In 2006, the European Commission addressed intra-EU BITs to the Economic and Financial Committee of the Council (EFC) about this.[50] In addition, the European Commission's view on intra-EU BITs became evident in the 2006 EFC Report, where it acknowledged the existence of approximately 150 BITs in force were between EU Member States. They stated that 'while part of their content has been superseded by community law upon accession', 'in order to avoid legal uncertainties and unnecessary risks for the Member States in the unclear situation', it suggested it was necessary to 'review the need for such BITs agreements and inform the Commission about the actions taken'.[51] The EU Commission's discontent over intra-EU BITs was expressed

[48] European Commission, 'Commission Staff Working Document on Capital Movements and Investments in the EU: Commission Services' paper on Market Monitoring' (SWD, 3 February 2012) < https://ec.europa.eu/info/sites/info/files/2012-market-monitoring-working-document-03022012_en.pdf> accessed 17 March 2018.
[49] Ibid.
[50] EFC, 'Report to the Commission and the Council on the Movement of Capital and Freedom of Payments', (Eurostat, 21 December 2005) <http://register.consilium.europa.eu/pdf/en/07/st05/st05044.en07.pdf> accessed 19 April 2018.
[51] Ibid.

in the 2007 EFC Report where it stated that intra-EU BITs were 'arbitration risks and discriminatory treatment of investors if intra-EU BITs are maintained'.[52] The Member States responded to the EU Commission's views by stating that:

> [M]ost Member States do not share the Commission's concern about arbitration risks and discriminatory treatment of investors. A clear majority of Member States prefers to maintain the existing agreements, in particular with view to the provisions on … protection of investments and investor-to-state dispute settlement. Still, a few Member States are seeking a solution for this issue.[53]

However, it was not until 2009 that the EFC stated that most of the Member States wished to maintain their intra-EU BITs since they did not share the European Commission's view on the incompatibility between these BITs and EU law.[54]

Despite the European Commission urging the Member States to terminate their intra-EU BITs, it was ignored by the States.

1.5 The rejection of the EU mandate by some States and EU infringement action

The EFC report suggests that '[a]fter the recent termination of some intra-EU BITs, there were 176 intra-EU BITs in February 2011."[55] However, the EFC has repeatedly

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[52] Ibid.
[53] Ibid.
[54] Lucian Ilie, 'What is the future of Intra-EU BITs', (Kluwer Arbitration Blog, 21 January 2018) <http://arbitrationblog.kluwerarbitration.com/2018/01/21/future-intra-eu-BITs/> accessed 16 March 2018).
[55] EFC, 'Report to the Commission and the Council on the Movement of Capital and Freedom of Payments', (Eurostat, 13 December 2011) <http://register.consilium.europa.eu/pdf/en/11/st18/st18451.en11.pdf> accessed 19 April 2018. According to the 2007 EFC report it had been stated that with regard to intra-EU Bilateral Investment Treaties (BITs), contrary to the Commission, some Member States consider them to be compatible with EU law and, in certain circumstances, indispensable to secure legal certainty for intra-EU investors until an alternative mechanism has been found. The EFC will continue to monitor developments and flag the need for any possible additional action to reinforce the single market as an attractive investment destination. See EFC, 'Report to the Commission and the Council on the Movement of Capital and Freedom of Payments', (Eurostat, 4 January 2007) < http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%205044%202007%20INIT> accessed 19 April 2018.

called for a pragmatic and efficient solution to the issue of intra-EU BITs in a way that is compatible with EU law.[56] The EFC acknowledges that some Member States still consider that intra-EU BITs are needed in order to maintain the protection of their investors, though, at the same time, an increasing number of Member States have expressed the view that intra-EU BITs are inapplicable, due to the supremacy of EU law.

As a result, in June 2015, the European Commission launched the first stage of infringement proceedings against five Member States: Austria, the Netherlands, Romania, Slovakia and Sweden.[57] These States were provided with letters of formal notice under Article 258 TFEU and were said to have been involved in intra-EU BIT disputes. The European Commission requested these five States to terminate their intra-EU BITs and entered into discussion with the remaining Member States who still had intra-EU BITs. Furthermore, it was noted that the European Commission felt that intra-EU BITs were outdated and no longer necessary in a single market of Member States.

1.5.1 The calls to terminate intra-EU BITs and individual State responses

By 2016, the European Commission had progressed the infringement proceedings to the second stage and sent a formal request for the termination of intra-EU BITs to Austria, the Netherlands, Romania, Slovakia and Sweden.[58] However, this generated

[56] Council of the European Union, Annual EFC Report for 2017 to the Commission and the Council on "The Movement of Capital and the Freedom of Payments" (European Commission, 29 May 2018 < https://data.consilium.europa.eu/doc/document/ST-9411-2018-INIT/en/pdf> accessed 22 June 2021.
[57] European Commission, 'Commission asks Member States to terminate their intra-EU bilateral investment treaties' (European Commission, 18 June 2015) < https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_15_5198/IP_15_5198_EN.pdf> accessed 15 February 2019.
[58] International Institute for Sustainable Development, 'European Commission requests Member States to terminate intra-EU BITs' (*IISD*, 4 August 2015) < https://www.iisd.org/itn/en/2015/08/04/european-commission-requests-member-states-to-terminate-intra-eu-BITs/> accessed 30 November 2020.

a mixed response as it was accepted largely by CEE countries but faced resistance from the Member States such as the Netherlands, France, Germany and the UK.[59] The CEE countries, on the other hand, held the view that companies located in Western Europe were responsible for suing them and were using intra-EU BITs to do so hence the agreement to terminate these BITs. Denmark launched negotiations in 2016 with its contracting States to terminate its intra- EU BITs.[60] This was the same position taken by the Czech Republic by terminating all its intra-EU BITs in 2016.[61]

1.5.1.1 Poland

In 2016, Poland's State Treasury announced its intention to terminate its BITs. Poland has sixty BITs currently in force that were signed between 1987 and 1998 with all Member States except Ireland, Malta (no BIT was agreed with these States) and Italy (which terminated its BIT with Poland in 2013).[62] VCLT provides for a Member State to terminate treaties. Under Article 54(b) VCLT, a treaty may be terminated with the consent of all parties after consulting with other contracting States.[63] Over the past few years, there have been at least twenty investment cases against Poland and eleven cases in dispute which amount to more than two billion euros. The number of investor cases against Poland may be higher than eleven as most of the cases against Poland are confidential and not disclosed. Thus, in several cases, Poland was ordered

[59] Allen and Overy, 'European Commission seeks termination of five EU Member States' intra-EU bilateral investment treaties' (*Allen and Overy*, 2015) < https://www.allenovery.com/en-gb/global/news-and-insights/publications/european-commission-seeks-termination-of-five-eu-member-states-intra-eu-bilateral-investment-treatie> accessed 25 June 2018.
[60] Nikos Lavranos, 'The end of intra-EU BITs is nearing' (*Thomson Reuters*, 13 May 2016) <http://arbitrationblog.practicallaw.com/the-end-of-intra-eu-BITs-is-nearing/> accessed 15 June 2018.
[61] Angeline Welsh 'Grappling with jurisdictional issues under the UK-Czech Republic BIT' (*The law of nations*, May 8, 2017) <https://lawofnationsblog.com/2017/05/08/grappling-jurisdictional-issues-uk-czech-republic-bit/> accessed 25 June 2018.
[62] Agnieszka Zarowna, 'Termination of BITs and Sunset Clauses – What Can Investors in Poland Expect?' (*Kluwer Arbitration Blog*, 28 February 2017) <http://arbitrationblog.kluwerarbitration.com/2017/02/28/booked-22-february-polish-BITs/?print=print> accessed 30 June 2018.
[63] Ibid.

to pay compensation to countries such as Germany, France and the US who were successful in their claim.

The State Treasury has now shifted its focus to the termination of intra-EU BITs due to believing BITs pose a threat to the country, whilst, in the early 1990s, the Polish BITs were created to motivate foreign investment.[64] However, if Poland proceeds with the termination of BITs it is unlikely to achieve a satisfactory outcome as most BITs contain sunset clauses which protect investors for a specified time after the termination of a BIT. This is further supported in the BITs between the UK, the Netherlands, and France with Poland whereby Poland's investments are still protected for fifteen years after the BIT was terminated, as opposed to twenty years as demonstrated in Germany's termination with Poland. Whilst Poland may endeavour to terminate its BITs immediately this is prevented by the delay of sunset clauses. Nevertheless, to overcome this Poland would need the consent of the other contracting party of the BIT to terminate it to warrant a mutual termination. This may be a way forward for countries such as the Czech Republic and Romania who have informed Poland of their intention to terminate their BITs alongside the termination of sunset clauses. In *Marco Gavazzi and Stefano Gavazzi v Romania*,[65] the investors brought arbitral proceedings in 2012 under the Italy-Romania BIT after the treaty had been terminated in 2010. During this time, the sunset period had not yet expired, and the effectiveness of the sunset clause was not questioned.

[64] Hogan Lovells, 'Poland considers terminating its Bilateral Investment Treaties' (*Hogan Lovells*, 29 February 2016) <https://www.hlarbitrationlaw.com/2016/02/poland-considers-terminating-its-bilateral-investment-treaties/> accessed 30 June 2018.
[65] ICSID Case No. ARB/12/25 *Marco Gavazzi and Stefano Gavazzi v Romania*.

1.5.1.2 Romania

Similarly, Romania passed a law in March 2017 to facilitate the outright termination of its intra-EU BITs.[66] Romania would be the third country to proceed with the termination of intra-EU BITs, following Italy in 2012 and Ireland in 2013. This means that if an intra-EU BIT does not provide a special termination clause, then it may be terminated under Article 56(2) VCLT. Under this Convention, a BIT may be terminated twelve months after Romania has informed the Member State of its intention. Due to this, it has been suggested that EU investors within Romania consider non-EU countries that have a BIT with Romania to ensure that their investments are protected in the same manner.

1.5.1.3 Sweden

On the other hand, Sweden, the home State in multiple ICSID proceedings has been less forthcoming.[67] The country argues that stronger evidence is required to support a direct violation of EU law by BIT provisions (in reference to the Sweden-Romania BIT) and it would be willing to terminate its BITs if a similar system of investment protection is provided.[68] Sweden calls for stronger evidence and consideration towards a new system of investment protection. This request aligns itself with the core objective of this work. As aforementioned, this research aims to find a solution to the conflict of jurisdiction between the EU and investment tribunals. The request from Sweden squares therefore with the objective of this research and emphasises its practical relevance.

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[66] Crina Baltag, 'Green Light for Romania to Terminate its Intra-EU Bilateral Investment Treaties' (Kluwer Arbitration Blog,14 March 2017) < http://arbitrationblog.kluwerarbitration.com/2017/03/14/green-light-for-romania-to-terminate-its-intra-eu-bilateral-investment-treaties/> accessed 20 June 2018.

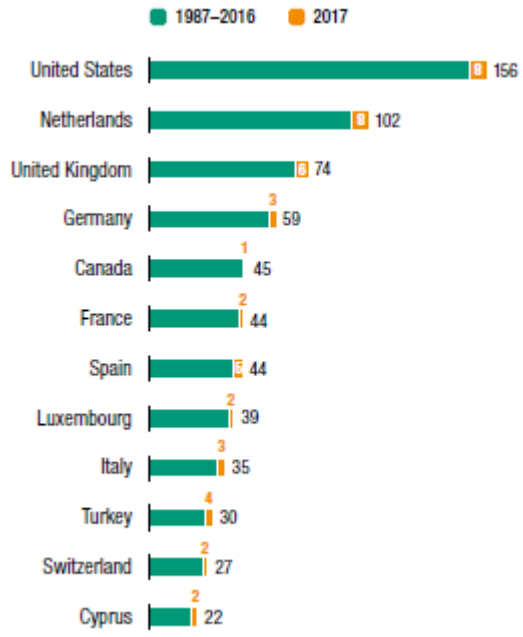
[67] Nikos Lavranos, 'The end of intra-EU BITs is nearing' (*Thomson Reuters*, 13 May 2016) <http://arbitrationblog.practicallaw.com/the-end-of-intra-eu-BITs-is-nearing/> accessed 15 June 2018.

[68] Joel Dahlquist, Hannes Lenk and Love Rönnelid 'The infringement proceedings over intra-EU investment treaties – an analysis of the case against Sweden' (2016) SIFEPS <https://uu.diva-portal.org/smash/get/diva2:926736/FULLTEXT01.pdf> accessed 9 May 2017.

1.6 Addressing these disputes

Intra-EU disputes accounted for about one-fifth of investment arbitrations initiated in 2017, down from one-quarter in the preceding year. The overall number of known intra-EU investment arbitrations initiated by an investor from one EU Member State against another Member State totalled 168 by the end of 2017, i.e. approximately twenty per cent of all known cases globally as demonstrated in figure 1.6.1 below). However, investors from the Netherlands initiated the most cases with eight cases, followed by the UK with six cases. Among intra-EU BITs, at least two terminations took effect in 2017. This frequency is demonstrated in the figure below which emphasises where the bulk of the claims emerged.

Figure 1.6.1 Most frequent home States of claimants, 1987-2017 (Number of known cases)

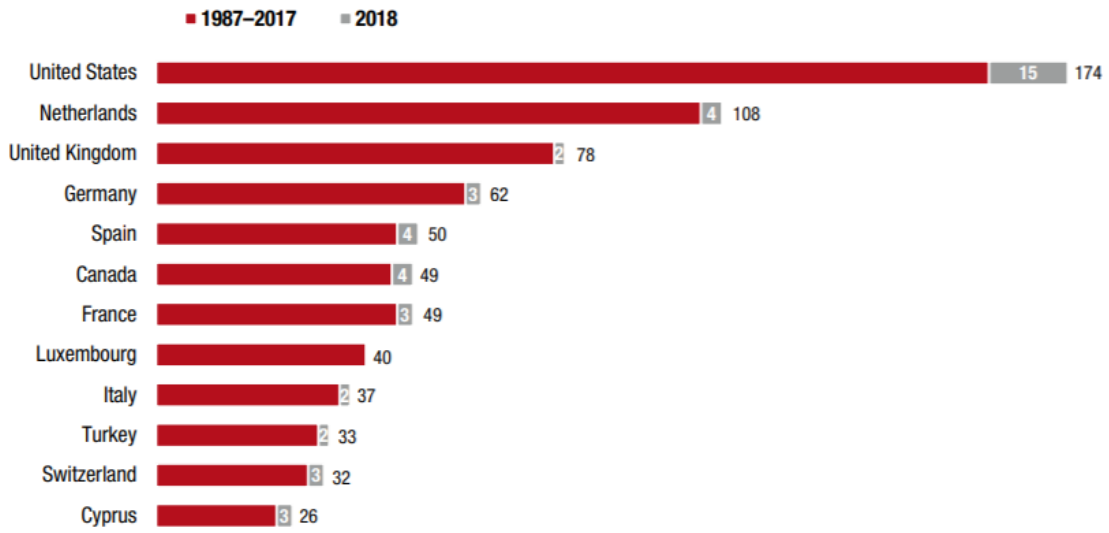


Source: ©UNCTAD, ISDS Navigator[69]

[69] UNCTAD, 'Investors-State Dispute Settlement: Review of Developments in 2017 (*UNCTAD*, 2018) <https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf> accessed 1September 2018

This dramatically changed in 2018. In 2018, seventy-one known cases were brought from developed country investors. However, less than ten per cent of the cases (six cases) were intra-EU disputes and two invoked intra-EU BITs. Furthermore, there were a total of 178 cases of arbitrations initiated by an investor from one EU Member State against the other. In support of this, the Netherlands and the UK have filed the largest number of cases. This is demonstrated in Figure 1.6.2 below.

Figure 1.6.2 Most frequent home States of claimants, 1987-2018 (Number of known cases)



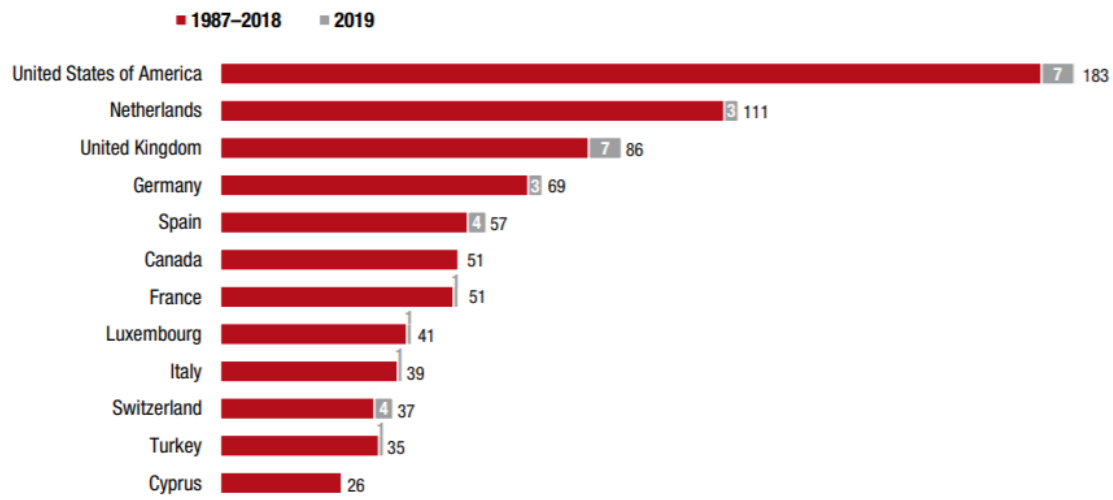
Source: ©UNCTAD, ISDS Navigator[70]

During 2019, fifteen per cent (seven cases) of the fifty-five cases filed were intra-EU disputes which was lower than the historical average of twenty per cent. Two cases filed related to intra-EU BITs were invoked and of all the known cases, the Netherlands and the UK have filed the most cases (see figure 1.6.3). Furthermore, by the end of 2019, there were 188 arbitrations initiated by an investor from one EU Member State

[70] UNCTAD, 'Investors-State Dispute Settlement: Review of Developments in 2018 (*UNCTAD*, 2019) <https://unctad.org/system/files/official-document/diaepcbinf2019d4_en.pdf> accessed 1 October 2020

against another. It remains unclear as to whether the recent EU developments have significantly reduced treaty-based intra-EU disputes. Arguably, the decrease in intra-EU disputes can be linked to the EU developments relating to the *Achmea* ruling.

Figure 1.6.3 Most frequent home States of claimants, 1987-2019 (Number of known cases)



Source: ©UNCTAD, ISDS Navigator[71]

1.7 Proposing a solution to the conflict of jurisdiction

This work thus seeks to address this problem of conflict of jurisdiction over competing EU BITs by proposing an EU investment court. There is a reason behind this proposal because nearly all intra-EU BITs expressly refer to international arbitration as the main dispute resolution method available to foreign investors. In intra-EU BITs, this may constitute a violation of Article 344 TFEU which states 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." On that basis, international arbitral tribunals constitute a threat to the exclusive competence of the

[71] UNCTAD, 'Investors-State Dispute Settlement: Review of Developments in 2019 (*UNCTAD*, 2020) <https://unctad.org/system/files/official-document/diaepcbinf2020d6.pdf> accessed 1 October 2020

CJEU and their inclusion in intra-EU BITs goes against the explicit prohibition in Article 344 TFEU against the Member States in choosing other forums to settle their EU-based disputes. Therefore, international investment disputes would fall within the jurisdiction of the European courts.

The European Commission unsuccessfully raised this argument in *Eureko*[72] that since Slovakia's accession to the EU, the CJEU obtained exclusive jurisdiction over the investor's claim. Thus, by accessing the EU, this "enable[d] EU law to supersede the legal systems of its Member States, including bilateral treaties, concluded between Member States."[73] The European Commission's authority over BITs entered into by the EU Member States stems from the TFEU, which came into force on 1 December 2009, granting the EU exclusive competence over FDI as part of its Common Commercial Policy.[74] This meant the power to negotiate and conclude extra-EU BITs shifted from the Member States to the EU (mainly the European Commission).[75] A similar argument was raised by the European Commission in *MOX plant*[76] that "an international agreement cannot affect the allocation of responsibilities defined in the treaties and, consequently, the autonomy of the Community legal system, compliance

[72] PCA Case No. 2008/13 *Achmea B.V v The Slovak Republic* (formerly *Eureko B.V. v The Slovak Republic*) paras 19 and 59.
[73] Ibid para. 135.
[74] Articles 206 and 207 of the TFEU on EU's new competence to conclude agreements with third states with respect to trade and FDI. After the Lisbon Treaty, Article 206 TFEU read as follows: "By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on *foreign direct investment,* and the lowering of customs and other barriers. [emphasis added]" Article 207(1): "The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, *foreign direct investment,* the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action."
[75] August Reinisch, 'The EU on the Investment Path – Quo vadis Europe? The Future of EU BITs and other Investment Agreements', [2014] 12 SCJOIL, 114, 114; Ahmad Ghouri, 'Interaction and Conflict of Treaties in Investment arbitration' [2015] KLI,149.
[76] Case C-459/03 *Commission of the European Communities v Ireland (MOX plant* [2006] ECR I-4635*,* para 177.

with which the Court ensures. The act of submitting a dispute of this nature to a judicial forum such as the Arbitral Tribunal involves the risk that a judicial forum other than the Court will rule on the scope of the obligation imposed on the Member States pursuant to Community law." However, it is unclear whether Article 344 TFEU can be extended to capture disputes arising from intra-EU BITs.

Despite the outcome of *Slowakische Republik v Achmea BV (formerly Eureko)*[77] the issue of jurisdiction displays ambiguities within the EU as demonstrated in *Micula & Ors v Romania & Anor*.[78] The English High Court stayed the enforcement of a 2013 ICSID award in favour of Swedish investors Ioan and Viorel Micula against Romania but refused to set aside registration. In addition, the English High Court gave permission to appeal the stay of enforcement but refused to make the stay conditional on the provision of security by Romania. The English Court's decisions, in this case, consider interesting aspects of the interplay between potentially conflicting obligations of national, international and EU law. In particular, the Court found that: as a matter of English law read with Article 54 of the ICSID Convention, an ICSID Convention award achieves finality, and becomes r*es judicata*,[79] at the time of the award; and the English Arbitration (International Investment Disputes) Act 1966, which implements the ICSID Convention into English law, only requires that ICSID awards be treated in the same way as judgments of the English High Court. Therefore, as a judgment of the High Court is subject to EU rules as to State aid, the Court is restrained from taking a decision which conflicts with the European Commission's decisions on State aid. Later the claimants' (Micula) applied to the General Court of the European Union (GCEU)

[77] Case C-284/16 *Slowakische Republik v Achmea BV* [2018] (f*ormerly Achmea v The Slovak Republic* which was formely *Eureko B.V. v The Slovak Republic*).
[78] [2017] EWHC 31 (Comm) (formerly *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20 (11 December 2013).
[79] Latin for "a matter judged".

to annul the European Commission's Final Decision and the High Court refused to set aside registration of the award but granted a stay of enforcement pending the outcome of the GCEU. The GCEU annulled the European Commission's Decision and found that the European Commission had exceeded its competence by retroactively applying its State aid powers under the TFEU to events predating Romania's accession to the EU. However, the European Commission disagreed and appealed before the European Court of Justice (ECJ) which set aside the General Court's judgment and found that the General Court erred in law in finding that the *Achmea* judgment is irrelevant in this case. The ECJ ruled that Romania was retroactively bound by the *Achmea* judgment, even though the incentives tax scheme was applied and repealed before Romania acceded to the EU.

1.8 Emerging solution- An EU investment court

Terminating intra-EU BITs without an alternative mechanism could potentially affect the EU's trade policy by casting doubts as to the need for investment protection provisions in trade agreements, especially with developed partners such as Canada and the United States of America (USA). Thus, if the European Commission maintains that investment protections within the EU are no longer needed due to the workings of the internal market, the EU may struggle to promote the interests of its investors when negotiating bilateral and multilateral investment agreements. It also undermines the ongoing effort to reform international investment through the creation of an international investment court system designed to safeguard the interests of foreign investors by enabling them to bring disputes pursuant to investment protection provisions within BITs. Furthermore, innovative protections contained in BITs are necessary for creating a level playing field between EU investors vis-à-vis[80] their

[80] French for "in relation to".

foreign competitors to promote intra-EU investment and ensure competitive investment terms for EU investors. Thus, the termination of intra-EU BITs is likely to be perceived by investors, banks, and creditors as an overall decrease in the legal protection for EU investors and create a competitive advantage for foreign investors who can rely on clearly defined and uniform protection standards under extra-EU BITs. Not affording EU investors comparable protection as their foreign competitors would incentivise them to locate their foreign investments outside the EU, which would have a detrimental impact on the functioning of the internal market. On the other hand, retaining substantive and procedural investment protection contained in intra-EU BITs would contribute to the implementation of the third pillar of the European Commission's Investment Plan of 2014 which aims at creating an investment-friendly environment by providing investors with a clear, predictable, and stable legal framework.[81]

This work will argue the creation of an investment court system for the purposes of handling intra-EU investment disputes as the most suitable way to address the problems of conflict of jurisdiction. While certain aspects of the problem may persist and this is discussed elsewhere in this work, there is a strong case for this recommendation. This will model the approach of the UPC. This proposal has already gained momentum following negotiations towards a Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada[82] as well as the Transatlantic Trade and Investment Partnership (TTIP) between the EU and USA, in which a bilateral investment court system has been suggested.[83] Chapter two, section three,

[81] European Commission, 'European Commission's Investment Plan of 2014' <https://ec.europa.eu/commission/sites/beta-political/files/investment_plan_booklet_en.pdf> accessed 22 September 2017.
[82] European Commission, 'EU-Canada CETA' (Europa, 2018) <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter > accessed 22 September 2017.
[83] European Commission, 'Transatlantic Trade and Investment Partnership' (Europa, 2015) <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf
> accessed 16 June 2017.

Article 9(2) TTIP Draft Investment Chapter (2015) provides that: "[t]he […] Committee shall, upon the entry into force of this Agreement, appoint fifteen Judges to the Tribunal. Five of the Judges shall be nationals of a Member State of the EU, five shall be nationals of the USA and five shall be nationals of third countries." This mechanism has already been incorporated in the EU–Vietnam Draft Free Trade Agreement (FTA) (2016) and the CETA Finalised Draft (2016).

A new independent European Investment Court would enable intra-European investment regulation to be undertaken free from perceived organisational biases or political agendas. In terms of design, it is proposed that the court should learn from many of the features of the WTO which according to Ehlermann is "an extraordinary achievement that comes close to a miracle […] and which has proved so far to be a notable success."[84] The WTO model will be examined as its main activity relates to resolving trade disputes and it is based on a mutually agreed solution through adjudication which is binding. In order to explore the model further, a comparative analysis will be applied to the WTO, given the close relationship between investment and trade.[85]

The Secretariat (headed by the Director General) oversees the day-to-day running of the WTO, with 640 staff at the headquarters in Geneva. Although not a decision-making body, the Secretariat is responsible for technical and legal support to the decision-making bodies and the Member States, and any prospective Member States.[86] The WTO's decisions are made based on consensus, with three levels of

[84] Claus-Dieter Ehlermann, 'Reflections on the Appellate Body of the WTO' [2003] 6 JOIEL 695, 695.
[85] WTO, 'The WTO in brief' (World Trade Organisation, 2017) <https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr02_e.htm> (accessed 22 September 2017).
[86] WTO, 'The organisational structure' (World Trade Organisation, 2017), <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org2_e.htm> (accessed 22 September 2017).

decision making in the organisation. The Ministerial Conference is the highest decision-making body and meets biennially, followed by a General Council consisting of Heads of delegation and ambassadors, or even officials from the Member States. It meets several times a year, as a Trade Policy Review Body and a Dispute Settlement Body. Underneath and reporting directly to the General Council are the Intellectual Property Council, Services Council and the Goods Council. Beneath the Council are various Working Groups and Committees. The newly created court should ideally have obligatory jurisdiction over claims filed by investors within the EU including those pursuant to intra-EU BITs. This would make the court a default mechanism for the resolution of investment disputes, with no competing bodies, within the EU.

On staffing, Gus van Harten recommends between twelve to fifteen judges, appointed by States for "a set term based on the model of other international courts."[87] The International Court of Justice (ICJ), staffed by fifteen judges, who are elected for a nine year term by the United Nations Security Council and General Assembly, provides a good model.[88] Continuity is guaranteed by the election process where a third of the judges are elected every three years, based on their expertise in international law but also persons of the highest moral character. The role of the ICJ is to settle international disputes where the parties have given their consent for the jurisdiction of the court. Similarly, the International Criminal Court which is the world's first permanent independent international criminal court with jurisdiction over the most serious crimes of international concern, and is complementary to national criminal jurisdiction.[89] This court is consent driven where the Assembly of States Parties agree to the court's

[87] Gus Van Harten, *Investment treaty arbitration and public law* (OUP 2007), 180.
[88] ICJ, 'Members of the Court', (ICJ, 2017) <http://www.icj-cij.org/court/index.php?p1=1&p2=2> (accessed 22 September 2017).
[89] UK Parliament, 'UK Support and Funding for International Criminal Justice' <https://questions-statements.parliament.uk/written-statements/detail/2018-07-17/HCWS864> accessed 1 July 2021.

jurisdiction. Despite this, the ICJ and International Criminal Court will not be fully explored in this work but reference will be made to their consensual nature.

Furthermore, the Common Court of Justice and Arbitration of the Organisation for the Harmonisation in Africa of Business Law (CCJA), which is a key institution of the OHADA, provides a good model.[90] The CCJA consists of thirteen judges selected by the Council of Ministers of the OHADA for a term of seven years non-renewable. The Court has its headquarters in Abidjan but can sit at any other place in the territory of one of the seventeen Member States[91] of the Organisation. Thus, the operation of the UPC, WTO and OHADA will be considered in determining the best model to pursue.

This work will examine the nature and scope of this proposal and how the court can be designed despite the challenges facing international investment in the EU. However, it would be beneficial to seek further guidance from the CJEU on the compatibility of intra-EU BITs and EU law, especially after the final decision of *Slowakische Republik v Achmea BV*.[92] The CJEU stated that the BIT between the Netherlands and the Slovak Republic does not run afoul of Articles 344, 267 and 18 of the TFEU. The BIT (Article 8)[93] complies with the prohibition of discrimination under Article 18(1) TFEU. According to the CJEU case law (C-376/03),[94] the latter is not

[90] OHADA is the acronym for the French 'Organisation pour l'Harmonisation en Afrique du Droit des Affaires', which translates into English as 'Organisation for the Harmonisation of Business Law in Africa.' *See* Martha Simo Tumndé, Mohammed Baba Idris, Jean Alain Penda Matipé, Claire Dickerson, John Ademola Yakubu, *Unified Business Laws for Africa, Common Law Perspectives on OHADA*, (GMB Publishing, 2009).
[91] Benin, Burkina Faso, Cameroon, CAR, Comoros, Congo, Ivory Coast, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, DR Congo, Senegal, Tchad and Togo.
[92] Case C-284/16 *Slowakische Republik v Achmea BV* [2018] (f*ormerly Achmea v The Slovak Republic* which was formely *Eureko B.V. v The Slovak Republic*).
[93] Netherlands- Slovakia BIT (1992).
[94] *D. v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* (2005) ECR I-05821.

discriminatory whereas the benefits which they grant are “an integral part thereof and contribute to the overall balance”.

Previously, in his opinion of 19 September 2017, the Advocate General (AG) concluded that Article 18(1) TFEU does not contain a most favoured nation (MFN) clause and does not prevent the Member States from affording treatment to nationals of another Member State which is not afforded to nationals of a third Member State. Article 18(1) TFEU provides equal treatment compared to nationals of the respective Member State. It was stated that disputes involving individuals are outside the scope of the provision under Article 344 TFEU and even if Article 344 TFEU applied, investor-state disputes do not concern the interpretation or application of the EU Treaties.

First, the jurisdiction of the arbitral tribunal is confined to rulings on breaches of BIT, and second, the BIT legal rules are not the same as those of the EU Treaties. The AG makes the important finding that the scope of the BIT is wider than the EU treaties. The BIT contains rules which have no equivalent in EU law and are not incompatible with it. Lastly, the arbitral tribunal is common to the Member States who are parties to the BIT and is permitted to request preliminary rulings. Applying the CJEU case law test, the tribunals are considered courts under Article 267 TFEU. However, the chaos that the infringement proceedings by the European Commission led to Austria, Finland, France, Germany and the Netherlands presenting counterproposals in April 2016.[95] These proposals were put forward in the “Non-paper” which suggested three alternative solutions to investment protection in light of the termination of intra-EU

[95] Council of the European Union, ‘Non-Paper ‘Intra-EU Investment Treaties: Non-paper from Austria, Finland, France, Germany and the Netherlands’ (*Trade Policy Committee*, 7 April 2016) <https://www.tni.org/files/article-downloads/intra-eu-BITs2-18-05_0.pdf> accessed 15 June 2018. For commentary, see Vanessa Naish & Elizabeth Reeves ‘The future of ISDS in the EU: leaked non-paper reveals proposal for EU-wide investment agreement’ (Herbert Smith Freehills LLP, 31 May 2016) <https://hsfnotes.com/publicinternationallaw/2016/05/31/the-future-of-isds-in-the-eu-leaked-non-paper-reveals-proposal-for-eu-wide-investment-agreement/> accessed 15 June 2018.

BITs. Firstly, it was suggested to rely on Article 253 TFEU to confer jurisdiction on intra-EU investment disputes. Secondly, to model the approach of the UPC in the proposed dispute settlement system such as the creation of a permanent investment court. Finally, to rely on the Permanent Court of Arbitration and agree on a *compromis*[96] with the aid of The Hague Convention of 1907. Overall, the Non-paper was in favour of intra-EU BITs and did not suggest the removal of BITs as it was seen as an extra layer of protection for investors. Though the Non-paper considered the phasing out of existing intra-EU BITs, it proposed a coordinated termination of intra-EU BITs whereby the Member States could agree to a multilateral agreement which will then supersede pre-existing intra-BITs.

As noted earlier in section 1.4, this research aims to find solutions to the conflict of jurisdiction problem between EU law and intra-EU BITs that has prompted the European Commission to; i) appear as an *amicus curiae* before courts and tribunals on behalf of EU Member States to challenge awards;[97] ii) advise the Member States on terminating their intra-EU BITs. The European Commission's intentions towards intra-EU BITs were captured in a statement by Jonathan Hill, the former EU Commissioner for Financial Services of the Financial Stability and Capital Markets Union, that:

> *Intra-EU bilateral investment treaties are outdated and as Italy and Ireland have shown by already terminating their intra-EU BITs, no longer necessary in a single market of 28 Member States. We must all act together to make sure that*

[96] A special agreement between two parties to submit a dispute to international arbitration for a binding resolution. A *compromis* is a mutual promise made after a dispute has already arisen, rather than before.

[97] See Maciej Zachariasiewicz, 'Amicus curiae in international investment arbitration: Can it enhance the transparency of investment dispute resolution?' (2012) 29 JOIA 205; Jorge E.Viñuales, 'Amicus Intervention In Investor-State Arbitration' (2007) 61 DRJ 72.

> *the regulatory framework for cross-border investment in the single market works effectively. In that context, the European Commission is ready to explore the possibility of a mechanism for the quick and efficient mediation of investment disputes.*[98]

However, discussions around a mechanism for the mediation of investment disputes are yet to take shape. Thus, this work is a response to the European Commission's assertion that existing intra-EU BITs are incompatible with EU law and therefore should be terminated.[99]

To appreciate the European Commission's position on intra-EU BITs, it is important to provide a brief background on the conflict between these two systems of law (EU law and international law obligations contained within intra-EU BITs).

1.9 Research question and rationale

These problems have prompted the question: To what extent can the current challenges on intra-EU BITs be resolved by an EU investment court? This thesis argues that to a large extent, these challenges can be resolved by this move toward multilateral court-based dispute resolution. As earlier noted, a multilateral court will aim to resolve the conflict of jurisdiction in relation to investment disputes.

This research will thus aim to provide a practical solution to the conflict between intra-EU BITs and EU law. From the analysis above, it is evident that EU states are willing to retain the element of investment protection but with a dispute settlement

[98] European Commission, 'Commission asks Member States to terminate their intra-EU bilateral investment treaties' (European Commission, 18 June 2015) < https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_15_5198/IP_15_5198_EN.pdf> accessed 15 February 2019.
[99] European Commission, 'Communication from the Commission to the European Parliament and the Council, (European Commission, 19 July 2018) < https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2018%3A547%3AFIN> accessed 15 February 2019.

mechanism, that recognises the supremacy of EU law. In addition, these States are not keen to remove BITs as a layer of protection but encourage the idea of terminating intra-EU BITs. Therefore, the EU investment court system offers a good starting point. This work will thus:

i) critically examine the relationship between EU law and international law obligations within intra-EU BITs.
ii) explore and assess the viability of a range of alternative solutions to intra-EU BITs enforcement within the EU.
iii) examine the operation of the OHADA, the UPC and the WTO to inform the reform direction towards an EU Investment Court.

1.10 Chapter outline

Following this chapter, this work will embark on a Literature Review in chapter two. This chapter will examine all the key scholarly work that has made a significant contribution to my area of study. This includes literature that evaluates the conflict of law situation between the EU and intra-EU BITs. The literature will be reviewed in a systematic order by tracing the development of this conflict of jurisdiction situation from the formation of the EU to its present state. This will include the problems faced by intra-EU BITs and proposals for an EU investment court. However, literature that analyses the conflict with Member State laws would also be considered in order to show how such matters have been resolved at a municipal level. This chapter further discusses the gaps or shortfalls in the literature on both the discussion of the problem of the conflict of jurisdiction and how solutions are advocated. This chapter, therefore, provides an explanation and discussion of the original contribution that this work makes.

Chapter three will examine the methodological approach taken in this work. A case study methodology will be used to determine the operation of the OHADA, the UPC and the WTO. These case studies will be carried out in chapter six with the results analysed in conjunction with the proposed investment court system and focus on *Achmea* as a single case study in chapter five. Other important methodologies such as doctrinal analysis and conceptualisation, with sufficient justification for their inclusion, will be provided in this chapter.

Chapter four will provide a theoretical and legal underpinning for this conflict of law situation. It will assess the role of investment tribunals and how this can lead to conflict with Union Law. Important cases where a conflict of law situation has arisen will be analysed plus the legality of both the obligations in International Investment Agreements (IIAs) and that under EU Law. In other words, this chapter will give a firm assessment of the legal problem that has motivated this research and justification for a new direction. This chapter will also assess the rationale behind an EU investment court proposed in TTIP and related IIAs because it deviates from the traditional arbitral approach. It will focus on the overview of the law on conflict of jurisdiction.

Chapter five will outline the problems and challenges of the law through an exploratory case study and evidence the issues flagged in *Achmea*.

Chapter six will provide case studies of the three establishments: the OHADA, the UPC and the WTO. The OHADA is primarily for African countries and the aim of this work is to determine how it has been able to overcome challenges of jurisdiction within Africa. Similarly, the UPC handles patent disputes across the EU in the shadow of International Law. Whilst the WTO resolves trade disputes among nations. This will also be analysed to determine whether its activities can provide sufficient lessons on

how to model a European Investment Court System. The lessons on the operation of all three establishments and their relationship with international law will be instrumental to the development of the proposed investment court system. At this stage, the proposed investment court will also be examined in light of the lessons derived from the case studies. This will help to determine the features of the court, the feasibility of the court and above all, whether and how it can overcome the conflict of law jurisdiction within the EU.

Chapter seven will provide and evaluate options on how the EU should move forward considering the challenges posed by the conflict of jurisdiction situation. These include alternative solutions and a proposal for an EU investment court. This chapter will bring together all strands of arguments raised throughout the thesis to reach a circumspect conclusion whilst highlighting the limitations of this thesis

1.11 Conclusion

The notion of an effective investment and investor protection within the EU has been suggested as the way forward following the *Achmea* decision.[100] This is based on the CJEU's decision that intra-EU BITs are incompatible with EU law and prompts a shift in focus toward the domestic courts of Member States in the protection of European investors' rights.[101] This is important as the purpose of the ECJ is to ensure the continued jurisdiction of European courts over investment protection.[102] Whilst investors may still seek to bring proceedings under the existing intra-EU BITs, there is no doubt that there will be an issue of establishing jurisdiction or enforcement due to

[100] Nikos Lavranos, 'After Achmea: The Need for an EU Investment Protection Regulation' Kluwer Arbitration Blog 17 March 2018 <http://arbitrationblog.kluwerarbitration.com/2018/03/17/achmea-need-eu-investment-protection-regulation/> accessed 26 April 2018.
[101] Ibid
[102] Von Daniel Thym, 'The CJEU ruling in Achmea: Death Sentence for Autonomous Investment Protection Tribunals' EU Law Analysis, 9 March 2018 <http://eulawanalysis.blogspot.com/2018/03/the-cjeu-ruling-in-achmea-death.html> accessed 5 June 2018.

the *Achmea* judgment. However, as noted in section 1.8, proposals have been concluded for a multilateral agreement among the EU Member States towards the termination of all intra-EU BITs which includes their sunset clauses. Nonetheless, it has not yet been decided how the agreement will fully function as not all countries may choose to be a party to such an agreement. This means that the EU Member States will have to consider alternative mechanisms which are binding and enforceable that will resolve intra-EU investment disputes. Moreover, it is known that the EU is already in favour of establishing a multilateral investment court as an alternative to investment arbitration. Whilst the European Commission's proposal for a multilateral investment court is pending, it will no doubt be subject to intense scrutiny. In the next chapter, various literature will be explored to trace the development of the conflict of jurisdiction.

Chapter 2: Literature Review

2.1 Introduction

Since the research question asks, to what extent can the current challenges on intra-EU BITs be resolved by an EU investment court, this chapter undertakes a literature review of the scholarly contributions to the challenges highlighted by the research question. This chapter will therefore examine literature in relation to intra-EU BITs that have made a significant contribution to the understanding of the growing conflict between the international law obligations contained within those BITs and the general body of European Law. It will further examine the literature that has considered the problematic aspects of this problem and the solutions offered so far to them. Mainly, it will consider the scholarship so far, that advocates an EU investment court. This chapter will then go on to discuss the original contribution of this present work.[103] It will indicate how the thesis situates with other academic scholarship and further the novel contribution that this work is making to the existing scholarship. This chapter takes the work forward by presenting a comprehensive literature review.

2.2 The relationship between EU law and intra-EU BITs

The relationship between EU law and intra-EU BITs permeated into academic literature at the beginning of this century largely due to the accession of the CEE countries between 2004 and 2007. The first major contribution to our understanding of this relationship was led by Söderlund in 2007, in his paper titled 'Intra-EU BIT Investment Protection and the EC Treaty.'[104] This paper was a reaction to the growing number of intra-EU BITs, thus increasing the possibility of investor state disputes. The

[103] See also Anca Radu, 'Foreign Investors in the EU. Which 'Best Treatment'? Interactions Between Bilateral Investment Treaties and EU Law', [2008] 14 ELJ 237.
[104] Christer Söderlund, 'Intra-EU BIT Investment Protection and the EC Treaty', [2007] 24(5) JOIA, 455, 456.

author argued that the pre-2004 Member States, mainly developed capital exporting States, had never needed to enter BITs with each other thus reducing the scope and need for intra-EU BITs. However, these States had concluded BITs with CEE countries, such as Latvia, Lithuania, Czech Republic, Estonia and Poland, who became EU Member States in 2004. The author further argued that the 2004 enlargement popularised the concept of intra-EU BITs, due to the increase in such BITs but also subsequent investment treaty disputes where a jurisdictional defence of inoperability of such BITs had surfaced. It is a defence premised on three major legal theories; i) that intra-EU BITs are *désuet*[105] because EU investment matters fall within the jurisdiction and are governed by EU law; ii) that the international law obligations contained within intra-EU BITs were superseded by EU law upon accession to the single market; iii) that the concept of intra-EU investor State arbitration is inconsistent with EU law. The author undertook a detailed examination of these theories in a bid to highlight why such theories cannot be relied on to invalidate a valid intra-EU BIT. The author concluded that EU law has a 'limited role' to play in shaping foreign investment policy and it is the role of individual Member States to advance their own investment ideals. However, this was before the Lisbon Treaty, which extended the European Commission's competence to include the negotiation of investment agreements on behalf of Member States. The author also reviewed the dispute settlement and protection provided in BITs as compared to those under the TFEU and reached a resounding conclusion that BITs provide far more protections and an investment specific dispute settlement option as an alternative to international arbitration. The arguments raised by the author received support in subsequent cases such as *Micula*

[105] French for 'outdated'.

v. Romania.[106] Faced with growing investment disputes pertaining to intra-EU BITs, subsequent scholars sought to examine the relationship further.

The next major contribution to this area of research was made by Wehland in 2009 by arguing that the European Commission's increased competence over investment matters could lead to a conflict with established norms of international law contained with intra-EU BITs.[107] The author argued that Member State courts could be more inclined to give full effect to EU law rather than investment arbitration awards when it came to enforcing those awards. Alternatively, Member States would have to refer such an award to the CJEU for a preliminary ruling to avoid making a decision that would conflict with their obligations under the TFEU. The author assessed the inherent conflict between the two systems of law including the different substantive protection standards, unequal treatment of investors from different Member States and the CJEU's lack of control over the dispute settlement process. The scholar concluded that EU law is relevant for intra-EU investment arbitration both by having an impact on a tribunal's assessment of the applicability and interpretation of intra-EU Investment Treaties and through the possible involvement of the Member States' court systems at different stages of the arbitral process. However, the author argues that this should not preclude investors from starting proceedings under intra-EU BITs and none of the objections towards intra-EU BITs justified either being an obstacle. However, the author cautions that an increase in the European Commission's competence over FDI

[106] ICSID Case No. ARB/05/20 *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, Decision on Jurisdiction and Admissibility (September 24, 2008).
[107] Hanno Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?', [2009] 58(2) IACLQ, 297.

is likely to stir up conflict and therefore make these largely theoretical objections highly contentious.[108]

The decision in *Eastern Sugar BV v Czech Republic* was subject to scrutiny in a 2009 paper written by Potestà.[109] The author, particularly in the second part of the paper, explored the consequences of the tribunal decision including the deteriorating relationship between EU law and intra-EU BITs. The author argued that the decision is likely to lead to the renegotiation of BITs.

2.3 The emerging conflict between intra-EU BITs

Much of the academic commentary post-2010 highlighted the emerging conflict between intra-EU BITs. The enforcement of ICSID awards within the EU had become highly problematic due to the European Commission's continued intervention in tribunal cases and refusal to enforce awards within the EU. Similarly, Fecák argued, following an investment dispute involving the Czech Republic that the current state of play calls for a new direction in which EU law is given some degree of recognition by arbitral tribunals.[110] The view that EU law and international arbitration are often at

[108] A similar position was taken by Marek Wierzbowski and Aleksander Gubrynowicz, commenting on the conflict of norms between intra-EU BITs and EU law. The authors made a significant contribution to literature by exploring the prospect of creating a "European Investment Court" for the purpose of handing Intra-EU BIT matters. However, such a move would require the renegotiation of BITs and it is also at the discretion of the investor who initiates the legal dispute to either choose the European Investment Court or opt for alternative dispute resolution bodies specified in the relevant IIA. This proposal was later considered as part of the EU's reform of international investment law, reflected in both the Non-paper and investment chapters of both TTIP and CETA. See Marek Wierzbowski and Aleksander Gubrynowicz, 'Regional aspects of Investment Protection, 29 Conflict of Norms stemming from Intra-EU BITs and EU Legal obligations: Some remarks on possible solutions' in Christina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP 2009).

[109] Michele Potestà, 'Bilateral Investment Treaties and the European Union. Recent Developments in Arbitration and Before the ECJ', [2009] 8(2) LPICT, 225.

[110] Tomáš Fecák, 'Czech experience with Bilateral Investment Treaties: somewhat bitter taste of investment protection', [2011] CYIL 2, 233-267. Similar views were voiced in Amelia Hadfield & Adnan Amkhan-Banyo's paper in which they argued that Russia opposition the Energy Charter Treaty provides clear indication that international arbitration tribunals operate with limited regard for public policy and public international law. Russia's subsequent denunciation of the Energy Charter Treaty signalled another layer of opposition to the instruments of international law and room to reconsider the essential role of international investment bodies such as arbitral tribunals.

loggerheads was also expressed by Bermann,[111] making reference to intra-EU civil and commercial litigation rules in which arbitration is no longer permitted under the Recast Brussels Regulation 2012. Generally, the author argued that EU supremacy is undermined significantly by the operation of intra-EU BITs which exert power and influence outside the scope of the European courts.[112]

While pre-2014 research appeared to refer more to a theoretical problem, post-2014 research was geared more towards finding a solution to the practical challenges posed by intra-EU BITs. For example, Stanič[113] argued the continued friction between EU law and intra-EU BITs is likely to impact investment agreements and harm investment within the Energy sector. However, little emphasis was placed on reform.[114] Similarly, Dahlquist, Lenk and Rönnelid studied the infringement proceedings over intra-EU investment treaties and reached a conclusion that terminating the intra-EU BITs could have a detrimental impact on the country's economy by affecting the level of investment.[115] The scholars, therefore, advised caution by advising that more evidence is needed to demonstrate a violation of the EU *acquis*.[116] The findings were like those reached by Wilske, Markert and Bräuningeret[117] who examined the cases

[111] George A Bermann, 'Navigating EU Law and the Law of International Arbitration', [2012] 28 AI 397, 429.
[112] George A. Bermann, 'Navigating EU Law and the Law of International Arbitration', [2012] AI, 28(3), 429. See also Freidl Weiss and Silke Steiner who examined the investment regime under Article 207 of the TFEU that grants the European Commission competence over investment matters by arguing that it provides broad scope to the commission to intervene in investment matters.
[113] Ana Stanič, 'Chapter I: The Arbitration Agreement and Arbitrability, EU Law: Deterring Energy Investments and a Source of Friction', in Gerold Zeiler, Irene Welser et al. (eds), Austrian Yearbook on International Arbitration (Wien 2015) 33.
[114] Ana Stanič, 'Chapter I: The Arbitration Agreement and Arbitrability, EU Law: Deterring Energy Investments and a Source of Friction', in Gerold Zeiler, Irene Welser et al. (eds), Austrian Yearbook on International Arbitration (Wien 2015) 33.
[115] Joel Dahlquist Cullborg, Hannes Lenk, Love Rönnelid 'The infringement proceedings over intra-EU investment treaties – an analysis of the case against Sweden', [2016] 4 SIEPS, 11.
[116] This relates to the accumulated legislation, legal acts, and court decisions which constitute the body of European Union law.
[117] Stephan Wilske, Lars Markert and Laura Bräuningeret, 'Chapter IV: Investment Arbitration, Pertinent Issues in Investment Arbitration against Romania: A Case Study in Challenges and Pitfalls of Investment Disputes in Central and Eastern Europé, in Zeiler, Gerold, Welser, Irene, et al. (eds), Austrian Yearbook on International Arbitration, 2015, 499.

against Romania and argued that termination of BITs appears to be the most likely option in light of the European Commission's intimation of taking the approach. The scholars also commented on the historical disparity in the flow of investment which meant that CEE countries were more likely to face an investment dispute brought by an investor from Central Europe. Thus, a number of scholars have been able to contribute to the literature by highlighting the directions individual countries are likely to take in response to the challenges posed by intra-EU BITs.[118]

2.4 Assessment of potential solutions

However, few scholars have made an attempt in providing an assessment of the possible solution and no scholar has provided a comprehensive examination of the proposals presented in the Non-paper. Clodfelter looked into the 'future direction' of the intra-EU agreements but did not make any recommendations beyond an assertion that consideration should be given to ways of uniting the two systems towards a common ground.[119] Thus, there is a dearth of research that explores the reform direction despite much academic commentary on the conflict between EU law and intra-EU BITs such as the principle of autonomy which plays an important role. The issue relates to what constitutes autonomy by way of determining the CJEU's case law.[120]

[118] See also Philip Strik, '*Shaping the Single European Market in the Field of Foreign Direct Investment*', (Hart Publishing 2014) 238.
[119] Mark Clodfelter, 'The Future Direction of Investment Agreements in the European Union', Santa Clara Journal of International Law, [2014] 2(1), 179.
[120] Yves Mersch, Laurie Achtouk-Spivak, Georges Affaki, Cristina Contartese and Ramón Vidal Puig, 'The new challenges raised by investment arbitration for the EU legal order' (European Central Bank, October 2019) <https://www.ecb.europa.eu/pub/pdf/scplps/ecb.lwp19~e4d0a59cea.en.pdf> accessed 15 December 2019.

Traditionally, it was rather unnecessary for "old" EU Member States[121] to require the need to enter into BITs. It was normal for these States to conclude BITs with Eastern European States such as Poland, Estonia, Latvia, Lithuania and the Czech Republic. Since 2004 these countries have now acceded to the EU. Currently, there are only two BITs that remain between "old" EU Member States which are Germany with Greece and Portugal. At present these BITs have not been invoked by investors to bring a claim against any of these States. In support, there are no investment disputes which has arisen against "old" Member States. Although in *Maffezini*,[122] a Member State (Spain) was a respondent but the dispute did not involve an intra-EU BIT as it concerned Argentina. Intra-EU BITs were not identified as a problem until the accession of States in 2004. The accession of States increased the number of intra-EU BITs as "old" Member States often entered into BITs with the new Member States.[123] Additionally, there have been a number of investment disputes where States have argued that BITs entered into with the other EU Member States before its accession cannot be invoked by another EU Member State.[124] However, having represented in an investor dispute case, Söderlund argues that intra-EU BITs have not been affected by the membership of States within the EU.

The issue of jurisdiction has also been a topic for discussion as demonstrated in the *Mox Plant* case[125] where the ECJ was involved in a case of conflicting jurisdiction. The matters raised concerned the competency of an investor-state tribunal in relation to a claim arising out of an intra-EU BIT. However, it was held that the investor-state

[121] These countries include 15 states: Belgium, France, Germany, Italy, Luxembourg, the Netherlands, Denmark, Ireland, the United Kingdom, Greece, Portugal, Spain, Austria, Finland and Sweden which joined in or before 1995.
[122] ICSID Case No ARB/97/7 Emilio Agustín Maffezini v The Kingdom of Spain.
[123] Christer Söderlund, 'Intra-EU BIT Investment Protection and the EC Treaty' (2007) 24(5) JOIA 456.
[124] Ibid
[125] Case C-459/03

dispute mechanism within the BIT does not conflict with the competence of the ECJ. In addition, the European Community (EC) Treaty[126] provisions cannot intrude on the BIT-based investor-state dispute resolution.[127] The reason for this is that Article 292 EC Treaty constitutes the agreement by the Member States to defer to that adjudicatory body.

Furthermore, EC law prevails over the national law of the Member State. Therefore, if a Member State were to rely on provisions within their legislation that are contrary to EC law, then EC law would prevail. Consequently, it is the responsibility of the acceding State to remove any incompatibilities in the agreement e.g. between EC law and the national treaty. Despite the issues of conflict, the most common method used by the Member States to promote and protect the foreign investment is BITs. The majority of European countries have concluded between twenty to forty agreements most with developing States. Moreover, most EU Member States have concluded around ten to twenty agreements with the other Member States.

Söderlund gives two examples of arbitral awards which dealt with intra-EU BITs. In the first example, the dispute concerned a claim where the claimant (investor) was ill-treated in some factories in the host State.[128] The host State acceded to the EU in May 2004 whilst the arbitration was initiated in June 2004. The case was heard in an ad hoc arbitration under the UNCITRAL Rules. The respondent States' position was that the BIT was not applicable due to the country's accession to the EU. However, this argument was rejected by the tribunal. It referred to a non-official Note issued by the

[126] Now known as the European Union.
[127] Christer Söderlund, 'Intra-EU BIT Investment Protection and the EC Treaty' (2007) 24(5) JOIA 459.
[128] The case arose out of the Agreement on Encouragement and Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic of April 1991.

Internal Market and Services Directorate-General of the European Commission,[129] which stated that "Member States exchange notes to the effect that such [intra-EU] BITs are no longer applicable, and also formally terminate such agreements (irreconcilable approaches as such)". Despite this, the tribunal did not find the Note was in favour of intra-EU BITs being automatically superseded and even if it were, the view would only have a persuasive effect on the tribunal.

Another example was a decision regarding the impact of a host State acceding to the EU. In this case, the tribunal held that the protections within the BIT did not conflict with EC law and the matter of supremacy was not an issue. It can be seen from the two decisions that there is a lack of acceptance that a conflict exists between EC law and intra-EU BITs. In addition, there is very little acknowledgement that intra-EU BITs are superseded by EC law. However, Söderlund recognises that there is an inequality between intra-EU and non-EU investors where in most cases the decision favours non-EU investors. This has led to questions which arise as to the future of the existing investor-state mechanism. He opined that due to the complex issues concerning intra-EU BITs, it is unlikely that there will be a significant change in relation to BIT investment protection. Furthermore, he believed that the existing intra-EU BITs would terminate once they had reached their termination period.[130]

Söderlund's contribution to literature was acknowledged as other scholars began to explore the same ideas such as the decisions of the arbitral tribunals However, Söderlund and these other scholars did not address the position of awards referred to

[129] The Free Movement of Capital, Note for the Economic and Financial Committee, prepared by the European Commission, Internal Market and Services DG.
[130] Christer Söderlund, 'Intra-EU BIT Investment Protection and the EC Treaty' (2007) 24(5) JOIA 468.

the ECJ and its impact. In addition, the author did not explore how the conflicts with EC law can be seen as a benefit rather than a detriment.

A further contribution to the conflict of jurisdiction issue between intra-EU BITs and EU Law came in 2009. Wehland, a specialist lawyer in International Arbitration, set out to find out how the conflict between intra-EU BITs and EC law can be considered relevant from an arbitration perspective. His article focused on the conflicting issues and whether the conflicts are justified.

Wehland identified that since the EU enlargement by the accession of Member States, the number of intra-EU BITs has risen. Many of these BITs have been presented before different forums such as ICSID, UNCITRAL and ad hoc arbitrations. However, if both parties to a BIT were not EU members, no conflict would arise with EC law. Despite this, Wehland explores how such conflict could be used in an investment dispute. Firstly, Wehland found that investment tribunals may need to take into account EC law where international law exists between both parties signatory to the BIT.[131] This may be used where the tribunal seeks an interpretation of EC law. Secondly, the arbitral process may involve occasions other than the investment tribunal where they are bound by EC law. Under Article 234 Treaty Establishing the European Community (TEC),[132] the Member State courts should refer any questions of interpretation of EC Law to the ECJ. However, on one hand, the investment tribunals

[131] Hanno Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community law an obstacle?' (2009) 58 ICLQ 301.

[132] Renamed the Treaty on the Functioning of the European Union (TFEU)- Article 267. Article 234 states: The Court of Justice shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community and of the ECB; (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

may turn to EC law for its interpretation which is not binding. On the other hand, even if an investment tribunal wanted to seek a preliminary ruling from the ECJ they would be prevented from doing so. The reason for doing so stems from the treaty's refusal within Article 234 TEC to acknowledge arbitral tribunals as 'courts or tribunals'.[133]

According to Wehland, EC law may be viewed as an obstacle where there is a link between international law and an investment dispute. This is because it is clear from public international law that EC law is a subsystem of international law[134] and European Treaties are public international law instruments.[135] As a result, it would not seem fitting to rule that EC law does not fit within intra-EU BITs. The author stated that a respondent Member State may argue that the BIT in its entirety or specific provisions are inapplicable and superseded by European Treaties.[136] Alternatively, EC law should impose that relevant BIT provisions are read with a restrictive approach. Wehland highlighted some concepts in relation to the inapplicability of intra-EU BITs that were entered before the accession to the EU. He stated that a respondent Member State could argue that its ratification of the BIT preceded its accession to the EU and that the earlier Treaty had effectively been terminated on ratification of the relevant Accession Treaty.[137] This argument was explored in *Eastern Sugar BV v Czech Republic* where the arbitral tribunals held that the BIT clause was not suspended by EU law. Whether a BIT is terminated or suspended it should be assessed in accordance with the provisions set out in the VCLT. However, it is more than likely

[133] Decision of the European Court of Justice Case C-102/81 Nordsee Deutsche Hochseefischerei GmbH [23 March 1982] para 13.
[134] See Eckart Klein, 'Self-Contained Regime' Max Planck Encyclopaedia of Public International Law, [2006] para 15.
[135] See also Kirsten Schmalenbach, 'International Organizations or Institutions: General Aspects' Max Planck Encyclopaedia of Public International Law, [2014] para 61.
[136] Hanno Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community law an obstacle?' (2009) 58 ICLQ 303.
[137] It indeed appears that all existing intra-EU BITs have been concluded while at least one of the signatories was still not an EU member.

that both Member States will be parties to the VCLT meaning its provisions will apply. Despite this, even if one of the parties is not a party to the VCLT or the VCLT cannot be applied due to its ratification after the conclusion of the BIT[138] the provisions will still apply to represent customary international law.

Article 59 VCLT, states that a Treaty can be considered terminated if the parties conclude a later Treaty relating to the same subject matter and the parties intend to be governed by that Treaty. However, the term ‘same subject matter’ is unclear and does not explain whether TEC and Treaty on European Union (TEU) relate to the same subject matter as the BIT. To address this issue, one has to look at the provisions of the Internal Market as intra-EU BITs are internal affairs. In the alternative, if the termination or suspension of a BIT under Article 59 VCLT fails, Wehland argues a tribunal would need to assess the applicability of the provisions in accordance with Article 30(3) VCLT. During this examination, the tribunal would have to consider if the intra-BIT is compatible with the TEC.[139] By this, the tribunal would have to ensure that the interpretation of the TEC provisions is given its ordinary meaning within Article 31(1) VCLT. Furthermore, if the interpretation was deemed incompatible with the BIT, it would not render the provisions inapplicable. In this instance, the intention of the parties will be taken into consideration and whether the agreement is temporal or not.[140] However, it is highly likely that a BIT provision which is incompatible with

[138] Article 4 VCLT states: 'Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States’.

[139] In full, Article 59 VCLT states: 'Termination or suspension of the operation of a treaty implied by conclusion of a later treaty 1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

[140] See International Law Commission 'Report of the Study Group of the International Law Commission on Fragmentation of International Law' (13 April 2006) paras 230.

community law would apply. This is based on the ECJ's view that the TEC takes precedence over other agreements between the Member States. Wehland further argues that even if a tribunal deems the BIT provisions applicable, a respondent Member State may argue that it should be interpreted in accordance with European Treaties.[141] Again, the provisions should be interpreted in accordance with Article 31(1) VCLT, where the ordinary meaning is used. When interpreting an intra-EU BIT, arbitral tribunals may have to analyse the competing standards of the TEC.

The author examines the application of EC law by the courts of the Member States and has concluded that the ECJ has always held that EC law prevails over national legal systems and bilateral agreements concluded between the Member States.[142] As a result, it is unlikely that Member State courts would be willing to participate in investment arbitrations if regarded as incompatible with EC law. Though a national court can be involved in the arbitral process, one way is when a respondent challenges an arbitrator, appeals against an interim award on jurisdiction or applies for an interim relief. Except for proceedings under the ICSID Convention, according to *lex arbitri*[143] the applicable law would be the national law of the seat of arbitration which would take precedence over EC law.[144] Another way in which national courts could become involved in the process is the execution and enforcement of an award. On one hand, the enforcement of non-ICSID awards is governed by the New York Convention and in these cases, national courts may refuse any enforcement of awards that it considers incompatible. On the other hand, ICSID awards are executed in accordance with

[141] See Ireland in the MOX Plant case before an UNCLOS tribunal, referred to in Opinion of AG Maduro in C-459/03, para 49.
[142] Decision of the European Court of Justice, Case C-235/87 Annunziata Matteucci v Communauté française of Belgium and Commissariat general aux relations internationales of the Communauté française of Belgium [27 September 1988] para 22
[143] Latin term for "law of the place where arbitration is to take place" in the conflict of laws
[144] Hanno Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community law an obstacle?, (2009) 58 ICLQ 308.

Article 54(3) ICSID Convention. It states that ICSID awards should be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought. This means that Member State courts may interpret this provision to rely on EC law, giving EC law precedence over national legal systems.[145] Again, this proves that the conflict between BIT and EC law could be seen as a setback in reaching the outcome of an investment arbitration. This begs the question as to whether there is a conflict between EC law and intra-EU BITs.

The author set out to explore whether a conflict between the latter exists. This was mainly highlighted by the Commission Note which suggested that most provisions of BITs have been replaced by EC law. Wehland's findings suggest that the lack of protection standards within a BIT does not conflict with EC law. He adds that EC law sets the minimum standards of protection for investment, but BITs provide additional protection to investors. Furthermore, BITs are said to make investors better off and conform to the purpose of the TEC. Wehland then considers the unequal treatment of investors from different Member States that derive from intra-EU BITs. He states that despite the protection standards contained in a BIT, investors seem to have the upper hand. For example, investors can pursue claims through investment arbitration as opposed to the national court system.[146] However, this could be criticised as this advantage is not available to investors that are not signatories to the BIT. As a result, one could argue that investors are being discriminated against based on their nationality. In support of this, he highlights two main arguments: BITs provide protection only for investors who are nationals or are signatories to the BIT and BITs

[145] E Baldwin, M Kantor and M Nolan 'Limits to Enforcement of ICSID Awards' (2006) 23 Journal of International Arbitration 17.
[146] SCC Case No. 088/2004 *Eastern Sugar B.V. v The Czech* (ad hoc arbitration under UNCITRAL rules), Partial Award of 27 March 2007, para 180.

provide protection to investors from contracting States and not the third Member States. This demonstrates discrimination against investors from the other Member States, third Member States and goes against the principles of the MFN's obligation to the Member States. Nevertheless, it is concluded that although BITs grant advantages to investors from selected Member States, it is not incompatible with EC law.[147]

From the analysis, the author makes it clear that EC law is relevant for intra-EU investment arbitration in terms of its applicability and interpretation of intra-EU BITs. Despite the challenges which exist such as different protection standards and unequal treatment, none amounts to EC law being an obstacle to such arbitrations. Given the exploration, Wehland did not look at the ECJ judgments which addressed incompatibilities with EC law and third countries.

Later in 2009, Potestà examined the relationship between BITs and the EU in relation to the recent developments in arbitration and before the ECJ[148]. Her findings were similar to the above, where she expressed that intra-EU BITs promoted differential treatment among foreign investors whilst recognising that BITs do not provide any additional protection to EU law. Most important, the author considered the consequence of existing and future BITs between the Member States and third countries.

In March 2009, the ECJ handed down two judgments which concerned the compatibility of EU law with BIT between the Member States and third countries. This

[147] Decision of the European Court of Justice, Case C-235/87 Annunziata Matteucci v Communauté française of Belgium and Commissariat general aux relations internationales of the Communauté française of Belgium [27 September 1988] para 23, where the ECJ merely observed that the reservation of a certain advantage to nationals of a certain Member State could 'not prevent the application of the principle of equality of treatment.'

[148] Michele Potestà, 'Bilateral Investment Treaties and the European Union. Recent Developments in Arbitration and Before the ECJ' (2009) 8 LPJCT 238.

was of particular interest as this was the first time in which the ECJ had ruled on BITs. The European Commission initiated infringement proceedings against Austria and Sweden for failing to take steps to remove incompatibilities from BITs concluded with third country BITs. These BITs were said to have been concluded before the Member States acceded to the EU. The European Commission argued that the BITs concluded with the non-Member States did not set out to provide free movement of capital to and from the third countries. As a result, under Article 307 EC Treaty it did not fulfil its obligation to eliminate such incompatibilities.[149] However, it is important to note that EC law does not necessarily prevail over Treaties between third States and Member States before acceding to the EU. It has been suggested by the ECJ case law that the intention of Article 307 EC Treaty is "to lay down, in accordance with the principles of international law, that the application of the treaty does not affect the duty of the Member State concerned to respect the rights of non-member countries under a prior agreement and to perform its obligations thereunder".[150] Despite this, where there are incompatibilities between the two treaties, Article 307(2) EC Treaty imposes an obligation upon the Member States to "take all appropriate steps to eliminate the incompatibilities established". Therefore, as confirmed by the ECJ, where such pre-Community agreements by negotiation have been made, the option for the Member State to mutually denounce the treaty cannot be ruled out. This is because a mutual (unilateral) denunciation should be a last resort and be possible under international law.

According to case law, it has been suggested that the issue of conflict between the BITs and possible future Community provisions and the court's judgments would affect

[149] Michele Potestà, 'Bilateral Investment Treaties and the European Union. Recent Developments in Arbitration and Before the ECJ' (2009) 8 LPJCT 238.
[150] Case C-84/98, *Commission* v. *Portugal*, [2000] ECR I-5215, para. 53; 18 November 2003

the scope of Article 307 EC Treaty. This could relate to how the wording and rationale of the EC Treaty are debated. Considering the wording and rationale, the court found in the cases of Austria and Sweden that there were instances of incompatibility in each treaty. It was found that some of the BITs were worded to allow investors to transfer capital freely. Nevertheless, the author explored the ruling by the ECJ in that the court decided against requesting the Member States denounce treaties. Potestà found this to be of interest as BITs provide a measure to denounce treaties under international law. Though this was the position regarding denunciation, the situation became more complex when the other Member States including Austria and Sweden are party to hundreds of BITs with third countries. Additionally, most BITs contain clauses which refer to the free movement of capital. By this, the court stated that "the incompatibilities with the [EC] Treaty to which the investment agreements with third countries give rise . . . are not limited to the Member State which is the defendant in the present case". Potestà stated that it is hoped that the European Commission would assist the Member States in renegotiating their BITs with third countries to ensure compatibility. However, the European Commission is familiar with such a process as it assisted in the adaptation of BITs entered into with the USA. This required the European Commission to address any incompatibilities with the obligations the States would have accepted by joining the EU,[151] which resulted in the introduction of additional protocols which amended the BITs. While the negotiations were successful, an agreement still could not be reached on the restriction of capital movement. The failure to reach an agreement could result in the European Commission requiring acceded States to denounce their BITs with the US to comply with *acquis communautaire*.[152]

[151] Anca Radu, 'Foreign Investors in the EU. Which 'Best Treatment'? Interactions Between Bilateral Investment Treaties and EU Law', 14 European Law Journal (2008) 237.
[152] This relates to the accumulated legislation, legal acts, and court decisions which constitute the body of European Union law.

Potestà adds that if negotiations began on revising all incompatible BITs that were entered into by the European Member States to denounce the BIT, it could promote fear among exporting States like Germany or the Netherlands whose investors would suffer greatly from the absence of treaty protection.

The author advanced literature on the recent developments before the ECJ as she explored the rulings in cases between EC law and third states. In turn, she highlighted the common issues of incompatibility and addressed the future of BITs with third countries. However, the article did not explore the role of arbitral tribunals.

Fecák[153] analysed the important role of investment protection in the Czech Republic due to its short history of legal protection which began after 1989. It was not until ten years later that investment protection became a topic for discussion. The Czech Republic faced a very high number of investment arbitrations despite its uniqueness. The author explains that it is not easy to find an explanation for this. While this was the case, the investment arbitrations increased the awareness of international investment protection within the Czech Republic. However, the investment arbitrations were faced with a lack of understanding and mistrust due to the large number of compensation payments made to foreign investors. This is key as his research hones in on the situation and conditions in which the agreements were being negotiated to demonstrate the investment disputes within the Czech Republic.

Former Czechoslovakia concluded its first BIT in 1991. At the time the economy strongly suppressed the idea of any form of private ownership and did not leave any room for private foreign investments. As a result, there was no need for promoting or

[153] Tomáš Fecák, 'Czech experience with Bilateral Investments: Somewhat bitter taste of investment protection' (2011) 2 CYIL 235.

protecting foreign capital by any special instrument of international law.[154] Fecák notes that the existence of BITs has been ignored by scholars and mentions the lack of literature on international investment law pre-1989. Although the first Czechoslovak BIT was signed in 1989, the communist regime shortly changed after the augmentation of BITs occurred. This is because the country's conclusion of BITs was the result of the initiative of the counterparties. Soon after this, Czechoslovakia concluded many BITs with the majority of western countries. In 1991, BITs were concluded with the following: Finland, France, Austria, Spain, Sweden and Switzerland. A year later BITs were concluded with Canada, Belgium-Luxembourg Economic Unions, Germany, Netherlands, Norway, Greece, USA and the UK. The author states that during the 1990s, BITs were concluded as they were instant and cost effective, a tool which was used to improve underdeveloped countries and to attract foreign investors.[155] Once most BITS were concluded with capital exporting countries the focus was shifted to other promising contracting states. By 1996, BITs were in force in most Central and Eastern European countries. At the time of the article, only seventy-seven BITs were in force with the Czech Republic with most from developed countries such as the USA and EU Member States. With the number of BITs concluded, the Czech Republic has attempted to develop its own model BIT for negotiations such as a foreign investment policy which was introduced after the split of Czechoslovakia in 1993. For example, in 1993 the government passed a resolution approving the BIT with Hungary. It contained a clause which meant that any future negotiations diverging from the principles of Hungary can be submitted to the government after being signed. In effect, this would mean that the Hungarian BIT should be followed in future negotiations and constitute

[154] Tomáš Fecák, 'Czech experience with Bilateral Investments: Somewhat bitter taste of investment protection' (2011) 2 CYIL 235.
[155] Ibid.

the first official Czech model BIT. Although the content differs between BITs, this is to a lesser extent the same as the original EU Member States which were concluded in the 1990s. This is because the Czech Republic was accepting models from stronger counterparties.

Since the early 1990s, the Czech Republic are notorious for the number of investment disputes initiated by investors. According to the United Nations Conference on Trade and Development (UNCTAD) report, at the end of 2010, the Czech Republic had been involved in eighteen investment disputes ranking in the third position worldwide.[156] Around CZK 15 billion (approximately EUR 600 million) was paid out to investors as compensation awarded by investment tribunals or settlement agreements. Yet, a vast amount of the awards remain undisclosed to the public. However, it soon became public knowledge that the Czech Republic were not able to defend its interests in arbitrations against foreign investors. They were constantly losing their case and became an easy target for foreigners and multinational corporations to claim compensation. During this time there was an increase in foreign investors threatening to initiate investment proceedings against the state for wrongdoings. Many of these threats reached the arbitration stage. Besides, it is unlikely that the number of investment disputes in the Czech Republic will decline in the near future. At the time of writing, several investment disputes were pending, and others notified the State of an investment dispute or that they were considering international arbitration.

It is well established that the relationship between EU law and intra- EU BITs is problematic due to the issues of conflict and compatibility. This has also affected the Czech investment protection practice and influenced their foreign investment policy.

[156] UNCTAD: Latest Developments in Investor– State Dispute Settlement. IIA Issues Note, N° 1, March 2011.

For example, in accordance with Article 351 TFEU (former Article 307 EC Treaty), it is obligatory for newly acceded EU Member States to put aside their obligation with EU law. However, any treaties entered into before accession are unaffected by the TFEU, but Member States should take necessary steps to remove likely incompatibilities with EU law.[157] The Czech Republic was found to have BITs that were inconsistent with its future obligations as an EU Member State. Due to negotiations with the US representation, in 2003 a Memorandum of Understanding was signed regarding the interpretation of US BITs and EU law. This impacted the Czech Republic as they later concluded an Additional Protocol to their BIT with the USA. Nevertheless, after the Czech Republic acceded to the EU in 2004, the issue of the compatibility of other BITs with EU law arose. Prior to the accession, the European Commission expressed its reservations concerning new Member States BITs with third countries. Despite the difficulties, the Czech Republic sent Notes to all contracting states requesting a renegotiation of the existing BITs to comply with EU laws. This task was successful as several negotiations took place where amendments and agreements were made. These agreements between the Czech Republic put the BITs into compliance with EU law with regard to forty-eight countries. The scholar found that it was clear that countries with a stronger negotiating position were not keen to accept amendments to their BITs in favour of the proposing party. It was then suggested that the Czech Republic still considered the need to maintain its intra-EU BITs.

Fecák advanced literature by analysing the history of investment protection in relation to a single Member State (the Czech Republic). His research was able to shed light on the position before investment protection was common and the factors which were

[157] Tomáš Fecák, 'Czech experience with Bilateral Investments: Somewhat bitter taste of investment protection' (2011) 2 CYIL 251.

the catalyst to its popularity. Whilst the research addressed the known factors, it explained the impact of the changes such as the renegotiation of BITs. However, the author did not explore why tension exists between the two legal regimes: the EU and international arbitration.

In 2012, Bermann published an article which analysed the reasons behind the tension between EU law and international arbitration law. The article explored the argument of public policy and the EU Member States invoking their obligations under EU law as a defence. It also reviewed arbitral tribunals and courts.

The notion of public policy is found in all legal systems. Despite this, it performs the same basic functions. Public policy limits how other permissible exercises of party autonomy are enforced within contract law, succession, or any private law field.[158] More important, is its limitation on the enforceability of applicable choice of forum choices, choice of law clauses, rules of foreign law or foreign judgments.[159] However, public policy limitations are based on the court's interest in safeguarding the fundamental values of the legal system. The author states that even under Brussels I Regulation, an EU Member State court may prevent recognition or enforcement from another Member State's courts based on public policy.[160] Furthermore, the Court of Justice has focused on public policy with its aim to prevent national courts from applying the defence of public policy in a broad manner.

In regard to the international arbitration world, public policy plays a major role. It is where arbitral courts may annul an arbitral award or where courts have denied

[158] George A. Bermann, 'Navigating EU Law and the Law of International Arbitration', (2012) AI, 28(3), 407.
[159] Ibid
[160] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

recognition or enforcement. The denial of an award by national courts based on public policy grounds is enshrined in the New York Convention, UNCITRAL model law on international commercial arbitration and in every law which seeks to attract international arbitration. However, in international arbitration, public policy is subject to a narrow interpretation which is based on national courts being eager to use public policy as a ground for rejecting international arbitral awards which it does not agree with. By this, international arbitration is undermined as an alternative to national courts as a forum for resolving international disputes.[161] In some legal systems, the narrowness of public policy is reinforced by concluding that public policy in this instance is international as opposed to national. Although public policy is restrictive in its interpretation, it acts as an additional and distinctive function within the EU and ECJ.[162] This is to ensure the primacy of EU law and the law of Member States. Additionally, where there is a conflict between EU law and investment protection the accommodation technique such as interpretation has its limits.[163]

The demands of EU law in relation to international arbitration have fallen to the Member States' courts. It involves claims where a valid arbitral award violates EU public policy as to whether recognition or enforcement should be annulled or denied. Furthermore, other courts have steered clear of the annulment of arbitral awards for violation of public policy where an arbitral tribunal issued an award that may have violated EU competition law.[164] Due to this shift, it is likely to conclude that were there

[161] George A. Bermann, 'Navigating EU Law and the Law of International Arbitration', (2012) AI 28(3), 409.
[162] Ibid 411.
[163] Ibid 431.
[164] *Thales Air Defence BV v. GIE Euromissile*, case no. 02/19606, 2005 Jurisclasseur 35 (Ct. App., Paris, Nov. 18,
2004)

is an issue for public policy depends on the character, content of the norm that has been violated and the importance of the values or interests that the norm embodies.[165]

The author contributed to literature as he examined the role public policy plays within EU law and international arbitration law. Bermann highlighted that public policy operates as a centrepiece within all legal regimes. However, the article does not explore the future of international arbitration law in respect of EU law.

In 2014, Clodfelter produced an article on the future of investment agreements within the EU. His article was centred on the findings of Professor Reinisch who conducted research on the new EU competence over FDI. The author focused on three areas: (i) the substantive standards likely to be included in future investment agreements entered into by the EU; (ii) considerations that are likely to apply in ISDS mechanisms and (iii) whether there is a place for BITs between Member States (intra-EU BITs) and its future.

Firstly, the standards of protection and treatment are fundamental as they are at the centre of international investment agreements. It has been known that their specific wording has had implications on agreements involving State parties and investors. Around 1998, there were a number of awards concerning investor treaty claims where the States have been involved and dissatisfied. The awards made have involved disputes under IIAs where EU Member States were a party and have broadly described the substantive protections and treatment investors provide.

Parliament looked into the prospects of EU treaties as providing protection for investors abroad and creating a liability for the EU and the Member States which may

[165] George A. Bermann, 'Navigating EU Law and the Law of International Arbitration', (2012) AI 28(3), 426.

prevent public authorities from carrying out regulatory tasks.[166] It was concerned with the environment, sustainable development and public health. Due to Parliament's concerns, the 2011 Parliament Resolution called on the European Commission to produce clear definitions of investor protection standards. This was to avoid broad interpretations that were inconsistent with legitimate public regulations.[167] In regard to the resolution, it aimed to ensure that any requirement for fair and equitable treatment would be defined based on the level of treatment established by international customary law. Additionally, any expropriation provisions would be provided with a definition which establishes a clear and fair balance between public welfare objectives and private interests.[168]

In 2013, the Commission proposed a framework to allocate financial responsibility for ISDS awards and Parliament made amendments with the Council and the Commission. Reinisch mentioned that during the debate over the European Commission's proposal, the Commission offered reassurance by stating "that the level of investment protection afforded by future investment agreements to foreign investors will be in line with general principles common to EU and Member State law . . . [and] in line with the best practices of EU Member States".[169] As a result, new treaties were to be based on Member States' experience and practice. This suggests that the best practices of Member States' law were more important than investment treaty practices. In effect, the Commission concluded that it was better to clarify the content of investment protection standards without reducing the level of protection.

[166] Mark Clodfelter, 'The Future Direction of Investment Agreements in the European Union', [2014] 12(1) SCJIL 164.
[167] August Reinisch, 'The EU on the Investment Path Quo Vadis Europe? The Future of EU BITs and other Investment Agreements', [2013] 12(1) SCJIL 132.
[168] European International Investment Policy: European Parliament Resolution of 6 April 2011 on the Future European International Investment Policy (2010/2203(INI)), Oct. 2, 2012, 2012 O.J. para 19.
[169] *See* Remarks of Commissioner De Gucht, EUR. PARL. DEB. (339) (May 22, 2013).

Secondly, EU BITs were built upon agreements between EU capital exporting Member States and countries that were capital importers in the developing world. This caused exporting States to become threatened in waiting for sovereignty immunity and agreeing to arbitrate. However, the position shifted with the North American Free Trade Agreement (NAFTA) which was the first time that two countries with flows of investment could agree to ISDS related disputes. Even though the US and Canada had a trade agreement they sought to add Mexico to the agreement and could not do so without involving ISDS to address concerns about the Mexican courts.

After much reluctance, the European Commission began to favour the idea to include ISDS in future BITs under its new competence.[170] Despite many concerns with the ISDS system, Parliament took "the view that, in addition to state-to-state dispute settlement procedures, investor-State procedures must also be applicable in order to secure comprehensive investment protection."[171] However, much attention has been given to the possibility of setting up an appellate process for reviewing arbitral awards with a more broad and substantive approach as opposed to what is available under the ICSID Convention. This is believed to be the most effective way in reducing inconsistency and increasing accountability for arbitral awards. The suggestion of an appellate mechanism is favourable towards future EU BITs. Furthermore, a leaked Council Negotiating Directives in 2013 concerning negotiations on a comprehensive trade and investment agreement with the USA stated that "consideration should be given to the possibility of creating an appellate mechanism applicable to investor-to-

[170] August Reinisch, 'The EU on the Investment Path Quo Vadis Europe? The Future of EU BITs and other Investment Agreements', [2013] 12(1) SCJIL 119.
[171] European International Investment Policy: European Parliament Resolution of 6 April 2011 on the Future European International Investment Policy (2010/2203(INI)), Oct. 2, 2012, 2012 O.J. para 24

state dispute settlement under the Agreement."[172] Moreover, the technicalities of how the appellate mechanism will function should not be underestimated. This will become clearer once the EU enters into negotiations with the USA. Overall, if ISDS finds its way into future EU IIAs, it is likely that it will contain features which will dramatically affect its operation.[173] As a result, any IIAs stemming from the new competence of the EU would set a new standard to balance the rights of investors.

Lastly, the author believes that intra-EU BITs sit uncomfortably within the EU legal structure.[174] This is due to the continued issues raised between the existing intra-EU BITs and how the tribunals have reacted. Though the argument has been put forward that intra-EU BITs are no longer valid, the provisions are dormant, and tribunals lack jurisdiction, this has been rejected before tribunals. Having litigated in several investor-state arbitrations, Clodfelter believes that the arguments of validity and operativeness are compelling. This is because where a State accedes to the EU, it forms a new legal order with all other Member States. Any previous BITs between the acceding State and existing Member States would be addressed by the new legal order to which both parties have agreed. The legal order will govern matters such as the free movement of capital and non-discrimination. This is the case even if EU law offers a wider scope of protection and thus meets the threshold for the test of incompatibility. The author found it hard to accept that BITs between certain pairs of Member States with different provisions and applications could be anything but incompatible with the principles of EU law.[175] This is further supported by the incompatibilities in the infringement

[172] *Council of the European Union, Negotiating Directives (United States of America)*, World Trade (Jun. 17, 2013) para 23
[173] Mark Clodfelter, 'The Future Direction of Investment Agreements in the European Union', [2014] 12(1) SCJIL 177.
[174] Ibid
[175] Ibid 178

proceedings against Finland, Sweden and Austria which involved extra-EU BITs. Clodfelter commented that in every intra-EU BIT, Investor-State dispute settlement ISDS provisions clash with Articles 344 and 267 TFEU. Article 344 TFEU states 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". For example, the author disagrees with Reinisch who stated that "both the *Mox Plant* case,[176] as well as Article 344 TFEU, expressly refer to inter-state disputes". Clodfelter stated that the *Mox Plant* case does concern an inter-State dispute but does not suggest that Article 344 TFEU is limited to only State parties. He suggests that although Article 344 TFEU does not explicitly make reference to inter-State disputes, the silence could be interpreted as a submission to a Member State to a non-EU treaty forum that violates Article 344 TFEU. In relation to Article 267 TFEU, which provides that where there is a question of interpretation of the EU Treaties it must be decided upon by a court or tribunal of a Member State. If needed it may consult the CJEU for a preliminary ruling concerning the question. However, Opinion 1/09 [177] raised questions as to whether the CJEU would render tribunals in accordance with Article 267 TFEU. This is because the CJEU observed that a court system would be relied upon to interpret and apply EU provisions. In turn, this removes the jurisdiction of Member States to hear the same disputes.

The author contributed to literature as he focused on the research of Reinisch[178] and advanced the ideas of the future of international investment agreements within the EU. The matters raised are said to be problematic in that existing intra-EU BITs sit

[176] *Commission v Ireland (MOX plant)*
[177] Opinion 1/09, Creation of a Unified Patent Litigation 2011 E.C.R. I-0137
[178] August Reinisch, 'The EU on the Investment Path Quo Vadis Europe? The Future of EU BITs and other Investment Agreements', [2013] 12(1) SCJIL 132.

uncomfortably in the EU legal system. Despite this, Clodfelter did not analyse the impact of the future of investment agreements in a particular sector.

However, Stanič examined how EU energy law undermines investment in the energy sector and explained why a source of friction exists between the EU and investors from non-EU countries.

In 2012, the EU adopted Regulation 1219/2012 which established transitional agreements for bilateral investment agreements between the Member States and third countries (hereafter referred to as the "regulation"). In accordance with Article 3.1(e) TFEU, the regulation will act as a rule where EU law will conclude BITs and FTAs with non-EU states. Article 7 Regulation 1219/2012 states that the Member States wanting to enter into negotiations are permitted to "amend an existing or to conclude a new bilateral investment agreement" with a non-EU Member State which must be authorised by the European Commission.[179] The conditions in which the Commission grants authorisation is set out in Articles 8 to 11 of Regulation 1219/2012. The Regulation also states that any BITs entered into by the Member States with non-EU States (extra-EU BITs) "will be progressively replaced by agreements of the Union relating to the same subject matter".[180] This Regulation has had an impact on existing and future energy investments. Firstly, the Commission failed to review the compatibility of inter-governmental agreements which left uncertainty regarding agreements concerning infrastructure and energy supply contracts in the EU. Secondly, though the Commission has attempted to review the compatibility of agreements entered into before the Lisbon Treaty and before the Member States

[179] Ana Stanič, 'Chapter I: The Arbitration Agreement and Arbitrability, EU Law: Deterring Energy Investments and a Source of Friction', in Gerold Zeiler, Irene Welser et al. (eds), Austrian Yearbook on International Arbitration (Wien 2015) 33.
[180] Recital 5 of Regulation (EU) No 1219/2012 (2012) OJ L 351.

acceded to the EU, it undermines the certainty and stability of investment within the EU. Thirdly, there is a fraught relationship between EU law and international investment law. Lastly, where the Commission were to determine an IGA's incompatibility, Member States will be put in a difficult position where their compliance with EU law could mean that they are in breach of the Energy Charter Treaty (ECT).

It is well established that the EU Member States are parties to more than 190 intra-EU BITs and over 1200 extra-EU BITs.[181] Additionally, EU Member States are parties to the ECT and EU. The rights are as follows: (i) the right to FET); (ii) the right to national treatment; (iii) the right to the most favoured nation treatment; the right to compensation in case of expropriation or nationalisation and the right to proceed with arbitration in case of a breach of rights. Furthermore, the rights of investors have been a matter of debate as to whether EU law gives investors the same protection as BITs, ECT and international law.[182] In relation to the field of energy, the Commission has stated that EU law provides Member States with the same protection. Besides, arbitral tribunals have taken a different view such as "the protections afforded to investors by the BIT are, at least potentially, broader than those available under EU law (or, indeed, under the laws of any EU Member State)".[183] On the whole, the courts have attempted to clarify the relationship between EU law and international law when considering EU law. It honours any BITs that Member States entered before acceding to the EU. Moreover, if the courts were to only rely on Article 351 TFEU it would raise uncertainty about how to approach BITs entered into by the Member State after the EU accession.

[181] Extra-EU BITs relate to BITs between an EU member state and non-EU member state.
[182] Ana Stanič, 'Chapter I: The Arbitration Agreement and Arbitrability, EU Law: Deterring Energy Investments and a Source of Friction', in Gerold Zeiler, Irene Welser et al. (eds), Austrian Yearbook on International Arbitration (Wien 2015) 36.
[183] PCA Case No. 2008/13 *Achmea B.V v The Slovak Republic* (formerly *Eureko B.V. v The Slovak Republic*) para 245.

However, there was no mention of incompatibility until 2006. As a result of the Regulation in 2012, the Commission took an even more anti-BIT approach.[184]

It can be argued that the issue of uncertainty continues to exist between the EU and non-EU investors due to the considerable uncertainties regarding the investment framework, applicable law in disputes, the relationship between EU and international investment law and the enforcement of arbitral awards within the EU. The author contributed to literature as the research analysed the friction between EU law and international law but more specifically in the energy sector. It largely focused on investor disputes rather than States.

Dahlquist et al published their article on infringement proceedings of intra-EU investment treaties specifically analysing Sweden. This is key as they argue that the outcome of the initiated infringement proceedings by the European Commission against five Member States[185] have done more damage than intended. They explore the impact of the damage and how specific investors have been excluded from procedural protections.

In 2015, the European Commission issued a formal letter of notification to the Swedish Ministry of Foreign Affairs followed by a press release stating that five Member States had been targeted. The letter from the Commission stated that Sweden had not complied with its treaty obligations which in turn meant that the Commission had initiated infringement proceedings against the Swedish government. It was noted that although the Commission stated that the Sweden-Romania BIT "in its entirety" violates EU law it highlighted that (i) the investment protection standards under the BIT, as well

[184] Ana Stanič, 'Chapter I: The Arbitration Agreement and Arbitrability, EU Law: Deterring Energy Investments and a Source of Friction', in Gerold Zeiler, Irene Welser et al. (eds), Austrian Yearbook on International Arbitration (Wien 2015) 41.
[185] Sweden, Austria, the Netherlands, Romania and Slovakia.

as the provisions on expropriation and capital transfer provisions, overlap with TFEU provisions, (ii) provisions which provide investor-state and state-to-state arbitration are incompatible with Article 344 TFEU preventing Member States from consulting any judicial body other than the CJEU for resolving disputes within EU competence and (iii) the BIT's survival clause which ensures that a BIT could apply after its termination worsens the situation.[186]

Articles 1 and 2 Sweden-Romania BIT 2002 created standards of investment protection which is arguably the most useful protection for investors. These articles promote the protection of investors, fair and equitable treatment of investments, national treatment and MFN treatment. In addition, Article 4 Sweden-Romania BIT offers investors protection from expropriation without just compensation and Article 5 Sweden-Romania BIT allows the right of freely transporting capital for investment purposes. However, these articles overlap with EU law and discriminate against Member States which are not parties to the BIT. Despite, the EU's law falling short of standards of protection for those under the BIT, the expropriation provision is different to others. Article 345 TFEU states that "the Treaties shall in no way prejudice the rules in the Member States governing the system of property ownership". This suggests that expropriation only applies to those who are Member States. Whilst EU law provides the protection of property rights of EU nationals, Member States are permitted to enact more favourable provisions through national law or international law which is available under EU law.[187]

[186] Joel Dahlquist Cullborg, Hannes Lenk, Love Rönnelid 'The infringement proceedings over intra-EU investment treaties – an analysis of the case against Sweden', [2016] 4 SIEPS, 2.
[187] Hanno Wehland, 'Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?', [2009] 58(2) IACLQ, 310.

The Commission is mainly concerned with the violation of intra-EU BITs by non-discrimination based on nationality. Fundamentally, the principle of non-discrimination is explained in Articles 18, 49 and 63 TFEU.[188] The authors add that Member States are normally permitted to implement more favourable rules provided under the treaty as long as the benefits are non-discriminatory to EU investors.[189] However, the Sweden-Romania BIT reserves substantive and procedural benefits to investors who are States Parties but excluded investors from the other Member States.[190] On a different matter, the CJEU maintained a position where Member States are exempt from the obligation to extend benefits to nationals of the Member States, which are not privy to double taxation treaties. This supports the idea that the EU principle of non-discrimination does not extend to intra-EU MFN.[191] Yet, in *Matteuci*[192] the CJEU made it clear that under EU law where a BIT provides equal treatment to its nationals, there is an obligation to extend equal treatment to all EU nationals.

It is known that most BITs contain rules for previous investments up to and after the termination. The authors refer to this as a 'survival clause'. Survival clauses do not prevent unilateral termination but instead ensure the regulation of a BIT.[193] Still, the wording of the clause could be considered relevant even where the BIT has been terminated by consent.[194] The Sweden-Slovakia BIT was signed in November 1990

[188] Case C-221/89, *The Queen / Secretary of State for Transport, ex parte Factortame,* (1991) 320.
[189] Joel Dahlquist Cullborg, Hannes Lenk, Love Rönnelid 'The infringement proceedings over intra-EU investment treaties – an analysis of the case against Sweden', [2016] 4 SIEPS, 4.
[190] Michele Potestà, 'Bilateral Investment Treaties and the European Union. Recent Developments in Arbitration and Before the ECJ', [2009] 8(2) LPICT, 231.
[191] Angelos Dimopoulos, 'The Validity and Applicability of International Investment Agreements Between EU Member States under EU and International Law' [2001] 48 (1) CMLR 81.
[192] Case 235/87, *Annunziata Matteucci v. Communauté française of Belgium and Commissariat général aux relations internationales of the Communauté française of Belgium*, [1988] ECR 460.
[193] Federico Lavopa, Lucas Barreiros and Victoria Bruno, 'How to Kill a Bit [sic] and Not Die Trying: Legal and Political Challenges of Denouncing or Renegotiating Bilateral Investment Treaties' [2013]16(4) JOIEL 11.
[194] *Marco Gavazzi and Stefano Gavazzi v Romania*, ICSID Case No. ARB/12/25 (SCC Case No. V 2012/025) 27 August 2012.

and came into force in September 1991. Nonetheless, it allows a unilateral termination which is subject to a twelve-month waiting period. Whilst it can be terminated, it would initiate the survival clause in Article 11(3) Sweden-Slovakia BIT which extends the protection for an additional ten years. This protection would mean that an investor who is granted one year will benefit from a further ten years.[195] Nevertheless, the situation is different for the Sweden-Romania BIT which was signed in May 2002 and in force in April 2003. It is important to note that the twenty years have not yet lapsed. If there is no reason to withdraw from the treaty, then it cannot be terminated unilaterally until April 2023. As a result, the only way that the BIT could be terminated is by mutual consent. This is further supported by Article 54(b) VCLT where a Treaty could be terminated by the consent of all parties at any time.

The authors contributed to literature as the research explored how investors who were not a party to a specific BIT could be excluded from its protection. It also discussed the effect of sunset clauses which allow additional protection after the treaty has been terminated.

2.5 Developments within the law concerning jurisdictional issues

The CJEU's recent judgment in *Achmea* can be seen to be a controversial one, giving rise to a heated debate in relation to the validity of intra-EU BITs. This is because it has deemed intra-EU BITs redundant and illegitimate in relation to EU law being protected by BITs. Nagy argues that the complete invalidation of intra-EU BITs is flawed because the overlap between BITs and EU law is merely partial where BITs address a subject that the EU does not.[196] He states that approximately two-thirds of

[195] Joel Dahlquist Cullborg, Hannes Lenk, Love Rönnelid 'The infringement proceedings over intra-EU investment treaties – an analysis of the case against Sweden', [2016] 4 SIEPS, 9.
[196] Csonger Nagy, 'Intra-EU Bilateral Investment Treaties and EU Law After Achmea: "Know Well What Leads You Forward and What Holds You Back"' [2018] 19(4) GLJ 982.

the dispute cases are EU matters and if intra-EU BITs are rescinded then the number of investment cases in the region would be significantly reduced. Despite this, Nagy criticises the CJEU decision by arguing that intra-EU BITs should not be invalidated by EU law because the EU ignored the overlap between BITs and EU law. He further describes the CJEU's approach as narrow because it rules out substantive provisions.

Nagy suggests an alternative theory to intra-EU BITs by stating that intra-EU violates EU law and was implicitly abolished with accession.[197] This demonstrates the reliance on his argument where he suggests whether there is an overlap between the subject matter of BITs and EU law. The protective rights which are given to investors by way of intra-EU BITs provide legitimate expectations that merit legal protection. However, the level of protection would be compromised, and expectations frustrated if, at the time of accession, EU law did not replace the protection needed against another Member State. This has been highlighted by Nagy as an important matter which should guide the EU law's reaction concerning intra-EU BITs. He further adds that EU law has not provided an alternative mechanism to address intra-EU law because of the CJEU ruling. The ruling's scope has significant limitations. Firstly, it fails to deal with substantive provisions of BITs which may be applied by Member State courts or institutional arbitration. Secondly, the arbitral awards are considered to closely parallel EU law. This has not been stated within the judgment but may be deduced, considering that a preliminary ruling always interprets EU law in the context of a genuine legal dispute and the CJEU often distinguish cases with reference to the underlying facts. As a result, this warrants a narrow reading of *Achmea* by arbitral tribunals. However, Nagy describes a rejective approach that may be feasible only if it found reflection

[197] Ibid 998.

outside the EU in reference to judicial practice of recognition and enforcement.[198] Lastly, the application of intra-EU BITs' investment protection measures should not be irreconcilable with EU law because they address a subject EU law does not. He describes the lack of an alternative mechanism provided by EU law as one which impairs the European project painfully.[199] The impact of the CJEU ruling leaves arbitral tribunals with substantial residual power. This could be seen as the EU's attempt to suppress arbitration as an attempt to get out of freely assumed duties.[200] However, the CJEU ruling has neglected treaty shopping which allows EU investors to seek alternative ways of protection in the other EU Member States via third countries and claim the benefits of extra-BITs in intra-EU matters.[201] To address the limitations, it has been suggested for national courts apply the substantive provisions of intra-EU BITs. This would seek to deal with the substantive provisions protecting investors from illegal and uncompensated expropriation.[202]

2.6 Existing proposals for a developed system and potential limitations to the proposals

The creation of an investment court which mirrors the model of the UPC may seem viable to deal with intra-EU disputes, but the recent effects of Brexit cannot be ignored. Whilst the tension between the EU's legal order and the international investment law regime are not new, it can be said that Brexit has added even more pressure following the referendum. The UK stated that it will remain a party to the unified patent system regardless of Brexit. This means that the British government would rely on a system

[198] Ibid 1013.
[199] Ibid 1014.
[200] Csongor Nagy, *Intra-EU BITs after Achmea: a Cross-Cutting Issue in Nagy* (Edward Elgar Publishing 2019) 12.
[201] Csongor Nagy, 'Extra-EU BITs and EU law: Immunity, "Defense of Superior Orders", Treaty Shopping and Unilateralism' in Csongor Nagy (ed), Investment Arbitration and National Interest (Council on International Law and Politics, 2018) 143.
[202] Ibid

where the investors including the other Member States will seek legitimate expectations of judicial protection for the forthcoming UPC. Segate has argued that Brexit would cause a chain of investment claims which goes against the idea of the unified patent system establishing a boost for investments.[203] He further adds to this by stating that unless the UK participates in the Unified Patent System, the UK judges will miss out on defining the future requirements of European patenting, since the UPC's decisions are likely to influence the jurisprudence of the European Patent Convention and its administrative appeals system'.[204] However, he does recognise a limit to internal investment arrangements by drawing upon the CJEU's *Achmea* judgment rendering intra-EU BITs illegal, followed by a Declaration for the Member States to terminate a vast number of intra-EU BITs. Previously concerned with the incompatibility of certain clauses of certain BITs with EU law, the CJEU zealously imprinted an interventionist shift to its approach, by censuring many BITs pre-emptively, in accordance with the 'hypothetical incompatibility'-doctrine.[205] However, the predicament that '[i]ntra-EU BITs confer rights only in respect of investors from one of the two Member States concerned, in conflict with the principle of non-discrimination among EU investors within the single market under EU law is unfathomable, as any BIT by its nature provides the same set of rights and duties for both parties' investors.[206] Furthermore, 'by setting up an alternative system of dispute resolution, intra-EU BITs take away from the national judiciary litigation concerning national measures and involving EU law'. This is because it is unlikely for investment

[203] Riccardo Segate, 'The Unified Patent Court and the frustrated promise of IP protection: Investors' claims in (post-)Brexit Britain' [2020] 27(1) MJECL 77.
[204] Luke McDonagh, 'UK Patent Law and Copyright Law after Brexit: Potential Consequences', in O.E. Fitzgerald and E. Lein (eds.), Complexity's Embrace: The International Law Implications of Brexit (CIGI Press, 2018) 85.
[205] Tetyana Komarova, 'The Court of Justice of the European Union and International Legal Order' [2017] 5(3) RJL 150.
[206] Riccardo Segate, 'The Unified Patent Court and the frustrated promise of IP protection: Investors' claims in (post-)Brexit Britain' [2020] 27(1) MJECL 86.

tribunals to make preliminary references to the CJEU. Likewise, the EU could have simply required investors to exhaust courtroom forms of local remedies.[207] However, Segate argued that the CJEU has strengthened the supremacy, autonomy and 'self-containedness' of EU law by ruling that non-commercial intra-EU investment disputes must be resolved by the judiciary, approved by the Commission and for the Member States to commit to terminating BITs between themselves.[208]

2.7 The contribution of this research to the scholarly debates so far

This work makes an original contribution to international investment law as it presents a fresh evaluation of the viability of the three counterproposals advanced in the Non-paper in order to provide a practical solution to the conflict between intra-EU BITs and EU law. Further originality is provided through consideration of the approach taken by organisations such as the WTO, the OHADA and the UPC, which will feed into my analysis. Thus, the findings made in this research will inform policymakers across the EU on the relationship between EU law and intra-EU BITs. This research is also relevant because several intra-EU investment disputes remain unsettled due to issues around enforcement. Thus, this research would shed light on the European Commission's continued unwillingness to enforce tribunal awards which deem in conflict with EU law.

2.8 Conclusion

This chapter has considered various scholarly discussions to assess the current challenges posed by intra-EU BITs. It has examined the key contributions to literature which discussed the issues of the conflict of jurisdiction and provided solutions to

[207] Communication from the Commission to the European Parliament and the Council, Protection of intra-EU investment, COM (2018) 547 final, 2.
[208] Riccardo Segate, 'The Unified Patent Court and the frustrated promise of IP protection: Investors' claims in (post-)Brexit Britain' [2020] 27(1) MJECL 99.

address these. The scholarly discussions have identified the need for a further developed system to deal with intra-EU disputes. Therefore, a methodological approach will be undertaken in chapter three to explore a proposed system to address the issues of conflict with EU law.

Chapter 3: Methodology

3.1. Introduction

This chapter sets out the methodology used to answer the research question and present a solution which will defend the thesis and focus on the conflict of jurisdiction between intra-EU BITs and EU law. Legal research is based on both theory and method hence theoretical conceptualisation is one of the methods applied. The methods used in research are different from the black letter approach which is based on analysing the legal rules, interpreting case law and statutory provisions. Additionally, the black letter approach concerns the examination of cases, following the wording and interpretation. The same approach enables the researcher to analyse the meanings and implications of the rules and principles which underpin them.

Henn et al make a significant distinction between 'method' and 'methodology'.[209] They state that 'method refers to the range of techniques that are available to us to collect evidence about the social world. However, methodology concerns the research strategy as a whole'.[210] This methodology involves a hybrid of methods which would rely on three research methods (i) theoretical conceptualisation (ii) doctrinal analysis and (iii) comparative research.

3.2. Theoretical conceptualisation

The conceptualisation of theory helps to understand the way in which a blend of study areas is connected in order to form a theory.[211] It provides theoretical cohesion to the research gathered and conclusions from theory-building evidence.[212] This method will

[209] Matt Henn, Mark Weinstein and Nick Foard, *A Critical Introduction to Social Research* (2nd edn, Sage Publications 2009) 10.
[210] Ibid
[211] Vincent Anfara and Norma Mertz, *Theoretical framework in qualitative research* (Sage Publications 2006) 23-35.
[212] Shosh Leshem and Vernon Trafford, 'Overlooking the conceptual framework' [2007] 44 IETI 93, 100.

enable a deeper understanding of the concepts and their relations. Legal research has its theoretical and methodological approach which is based mainly on social science. This is the reason why methods used in this thesis such as theoretical conceptualisation are mainly empirical and social-theoretical. According to Leshem and Trafford, conceptualisation "provides theoretical cohesion to the evidence and conclusions from theory-building research".[213] By this, concepts are contextualised to gain a deeper understanding and reasoning behind them. Theoretical conceptualisation is one of the approaches applied in this research. This is because it fosters a deeper understanding of the issues by looking at the larger picture. In addition, it helps to understand a complex relationship such as that within the EU and intra-EU BITs. This provides a broader base for critical analysis and reaching well-grounded conclusions.[214]

3.3. Doctrinal analysis

The balancing of opinions and exploring decisions from different cases and policy documents are the starting point of doctrinal analysis. The doctrinal methodology requires the careful reading and comparison of judicial opinions with a view to identifying ambiguities, exposing inconsistencies among cases and lines of cases, developing distinctions, reconciling holdings and otherwise exercising the characteristic skills of legal analysis.[215] Within this research, it is used to understand the law and brings out the motivations behind intra-EU BITs. The doctrinal analysis will allow an examination of a legal opinion in order to reach a decision on whether it was rightly decided and to explore its implications for future cases[216] such as the

[213] Ibid.
[214] Barney Glaser, 'Conceptualization: On theory and theorizing using grounded theory' [2002] IJQM 1, 1-30.
[215] Richard Posner, 'The Present situation of Legal Scholarship' [1980] 90 YLJ 1113,1113.
[216] Emerson Tiller and Frank Cross, 'What is Legal Doctrine?' [2006] 100 NULR 527,517; Dawn Watkins and Mandy Burton, *Research methods in Law* (Routledge 2013) 56.

opinion of the AG in its request for a preliminary ruling. This description reflects the legal analysis carried out in this thesis. For example, the groundbreaking decision in *Achmea*[217] will be analysed to examine the reasons why the CJEU decided against the AG's decision by ruling that intra-EU BITs are incompatible with EU law.

Doctrinal research is 'a detailed and highly technical commentary upon, and systematic exposition of, the context of legal doctrine.[218] Although the study of law is based on logical conclusions, these conclusions are not an exact science. They are based on judgments influenced by history, culture, politics and economics. [219] According to Vick, these influences are classed as 'interdisciplinarity' which is a combination of different areas of study. [220] Nissani maintains the view that interdisciplinary research can be undertaken at differing degrees of integration.[221] For example, it is possible for a researcher to highlight the connectivity of two areas without combining them.[222] Furthermore, Vick states that 'many interdisciplinarians perceive doctrinalists to be intellectually rigid, inflexible, and inward looking; many doctrinalists regard (socio-legal) interdisciplinary research as amateurish dabbling with theories and methods the researchers do not fully understand'.[223] Moreover, once there is a clear and comprehensive system for assessment in place, the researcher will provide recommendations based on the findings such as an EU investment court.

[217] Case C-284/16 *Slowakische Republik v Achmea BV* [2018] (f*ormerly Achmea v The Slovak Republic* which was formely *Eureko B.V. v The Slovak Republic*).
[218] Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Longman 2007) 49.
[219] Oliver Wendell Jr Holmes, 'The Path of the Law' [1897] 10 HLR 457, 465–6.
[220] Douglas Vick, 'Interdisciplinarity and the Discipline of Law' [2004] 31 JLS 163, 164.
[221] Moti Nissani, 'Fruits, Salads, and Smoothies: A Working Definition of Interdisciplinarity' [1995] 29 JET 121,124.
[222] Ibid.
[223] Douglas Vick, 'Interdisciplinarity and the Discipline of Law' [2004] 31 JLS 163, 164

However, an examination of the proposal for an investment court which is adopted by other legal systems, with its own legal tradition will enable the research to look beyond the black letter law. For example, the examination of the OHADA will consist of analysing how the EU could adopt the African approach whereby the headquarter remains in one location but can sit at any other place within its Member States. Although this thesis is not interdisciplinary, it seeks to use interpretative tools and methods to expand on a specific area of law.[224] Once the tools and methods are applied it will foster a sound recommendation based on the findings. Furthermore, this research does not involve any interdisciplinary aspects as this would extend beyond the scope of the research and its purpose.[225] However, it involves a doctrinal approach in its methodology which is critical and relies on qualitative data from legal sources to support its aims. This approach will involve identifying legal rules within other jurisdictions such as Africa. Additionally, the examining of existing literature on the subject of intra-EU BITs is to identify similarities and differences that may exist and the findings of other scholars. This will assist in understanding relevant issues that may exist. The information will be gathered from a variety of sources such as textbooks, case law and journal articles.

There are certain advantages to the doctrinal approach within this research. A doctrinal approach can provide a structural basis to form a foundation for the thesis. Similarly, it provides coherence to the subject matter. Alternatively, there are disadvantages such as being too formalistic in its approach.[226]

[224] Ibid 165.
[225] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' [2012] 17 DLR 83, 84.
[226] Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Longman 2007) 99.

3.4. Comparative research

The last method that will be applied is the comparative research methodology. As a study that will encompass an examination of legal mechanisms when assessing the viability of the proposals in the Non-paper, this type of method will be useful in undertaking such a task. For example, in order to fully explore whether a permanent investment court could be a suitable solution, the operation of the WTO, regional bodies such as the OHADA and a court system such as the UPC will be examined. The lessons gained from this analysis will feed into the reform solutions. Comparative analysis has been described as a method that would "acquire insight into foreign systems, to find solutions for problems of a specific legal system, or to promote the unification of law between national legal systems."[227] Thus, the aim is to borrow attributes from other legal systems when building the proposals in the Non-paper to which a comparative approach is necessary.

The comparative approach as a method of research has been adopted to examine the mechanisms and compare different legal systems in support of the proposal for an EU investment court. When applying this method in research it is important to establish why this approach was selected and how it can be justified as an appropriate method. It is necessary to make clear the benefits that can be obtained from comparing laws from different jurisdictions. This method will assist in comparing laws from different jurisdictions such as EU law and African law. The comparison of laws would be used to understand one's own domestic legal system by examining how other jurisdictions deal with the same problem.[228] One of the aims of this thesis is to use comparative research as a method to compare different legal systems and to assess whether

[227] Ellen Hey and Elaine Mak, 'Introduction: The possibilities of comparative Law methods for research on the rule of law in a global context' [2009] 2 ELR 287, 288.
[228] Hugh Collins, 'Methods and Aims of Comparative Contract Law' [1991] 11 OJLS 396,399.

African law could provide a solution to the conflict of jurisdictions within the EU in relation to intra-EU BITs. Collins stated that the use of comparative law as a way of applying law from one jurisdiction to another legal system is not always effective.[229] This is further supported by Kahn-Freund who suggested that legal rules are a result of the historical and social development of that country and that applying a rule or body of law may not have the same effect as it did in its home country.[230] As an example, Collins cites the Industrial Relations Act 1971 which was centred around the US but had no impact on labour relations in the UK. This was because the norms and rules are very different.[231] As a result, Collins suggests that it is better to use comparative research to improve one's understanding.

Comparative research allows for a critical analysis of the proposal for an EU investment court. It examines features in the law. For example, how the CCJA, which is a key institution of the OHADA, provides a good model for the EU and how the EU investment court can be designed. In addition, it will explore the operation of the proposed European Investment Court and how it handles disputes in relation to international law. However, while the comparative method may seem positive, it does have a few restrictions such as it may be difficult to obtain judgments of cases, and problematic to access information from other jurisdictions or legislative materials. Although the OHADA contains a wealth of information it is important to note that these can only discuss the Treaties and Uniform Acts which have been translated into English.

[229] Ibid 397
[230] Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' [1974] 37 MLR 1,1.
[231] Hugh Collins, 'Methods and Aims of Comparative Contract Law' [1991] 11 OJLS 398.

3.5. Other methods

This research will include a single case study as the aim is to analyse legal documents and compare what has been stated.[232] It is an empirical inquiry that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident.[233] However, data will not be collected to achieve the aims and objectives of this thesis. Similarly, the historical legal methodology will not be used because it gives an account of what happened in the past but does not consider future prospects.[234] Future events are key elements of this research as the main focus is on the flaws of the conflict of jurisdiction between intra-EU BITs and European Law and proposals for an investment court. For this reason, a historical legal methodology is not suitable for this research. Furthermore, the economic theory of law does not fall within this research as it underpins concepts of law supported by economic data.[235] Although Posner describes it as an important part of the law, it requires primary research to be collected.[236] There is no scope in this work to engage in primary research which is very time consuming, however future research should consider the economic theory of law.

3.6. Data required

This thesis relies on several sources in order to reach its conclusion. It includes quantitative data from sources such as the UNCTAD which produced the World Investment Report. For example, statistics from the UNCTAD are used to analyse

[232] Lawrence Neuman, *Social research methods: qualitative and quantitative approaches* (Pearson, 2013) 202.
[233] Donna Zucker, *How to do Case Study Research* (University of Massachusetts- Amherst 2009) 13; Dahlia Remler and Gregg Van Ryzin, *Research methods in practice: Strategies for Description and Causation*, (2nd edn SAGE 2010) 34.
[234] Harry Edwards, 'The growing disjunction between legal education and the legal profession' [1993] MLR 91 34,34-70.
[235] Dawn Watkins and Mandy Burton, *Research methods in Law* (Routledge 2013) 34.
[236] Richard Posner, *The Economics of Justice* (HUP 1983) 4.

trends in IIAs, establish cases initiated by an EU investor against another Member State and determine the number of intra-EU countries that have terminated their intra-EU BITs. After collecting the research, the data is carefully analysed before bringing the findings together to produce a sound conclusion. The conclusion will consist of a hybrid of primary and secondary data to address the aims of the research which will be presented in chapter four.

3.7 Validity and reliability

Qualitative research is defined as 'the interpretative study of a specified issue or problem in which the researcher is central to the sense that is made'.[237] This type of research is known to have an impact on the data gathered.[238] This is because the researcher may choose data which is applicable to their interests such as international investment law. Selecting data relating to the researchers' interests provides a bias which may interfere with the results and alter the conclusion. However, in this thesis, the potential risk of bias has been reduced as the research is conducted over a period of three years and the issue of validity is minimised.

3.8 Conclusion

The chapter has explained the research methods used within this thesis to explore systems such as the OHADA, the UPC and the WTO which overcome the challenges presented by the conflict of jurisdiction. It also discussed other methodologies used throughout this thesis to support the recommendation for the proposed EU investment court. Whilst this chapter has focused on the methodology, it is essential to examine the mechanisms through which conflict is resolved. Therefore, chapter four will

[237] Ian Parker, 'Qualitative Research' in Peter Banister, Erica Burman, Ian Parker, Maye Taylor, Carol Tindall (eds*), Qualitative Methods in Psychology: A Research Guide* (OUP 1994) 2.
[238] Beloo Mehra, 'Research or personal quest: Dilemmas in studying my own kind' in Betty Merchant and Arlette Willis (eds), *Multiple and intersecting identities in qualitative research* (Routledge 2000) 69-82.

analyse the legal theory behind the conflict of law jurisdiction issues and highlight the challenges which affect the current legal framework.

Chapter 4: EU Legal Order in the shadow of International Law

4.1 Introduction

This chapter provides a theoretical and legal underpinning for this conflict of law situation. It will assess the role of investment tribunals and how this can lead to conflict with EU Law. Important cases where a conflict of law situation has arisen as well as the legality of both the obligations in IIAs and that under EU Law will be analysed. This chapter provides an overview of the law on conflict of laws thereby setting the stage for the assessment of the legal problem that has resulted from it in the subsequent chapter.

4.2. The law on conflict of jurisdiction as applied in Investment law

EU law is a system of law which governs the Member States and takes precedence over national laws in the domestic courts of the Member States. It is responsible for overriding any conflict of laws that exists between the Member States. In a situation where conflict arises, the principle of supremacy is applied to ensure uniformity throughout the EU. This principle was endorsed by the European Communities Act which was passed in 1972 and accepted by the UK courts as demonstrated in *R v Secretary of State for Transport ex p Factortame Ltd (Interim Relief Order).*[239] However, the strength of the system of law can be seen when the EU has its own supreme court i.e., the European Court of Justice which determines the content and scope of EU law. This enables the European Treaties to differ from other international Treaties due to their uniqueness whereby they will take precedence over domestic courts at a national level. For example, in *Van Gend en Loos v Nederlandse*,[240] it stated:

[239] [1990] UKHL 7
[240] Case C- 26/62 *Van Gend en Loos v Nederlandse* [1963] ECR I.

> …The Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. … the Community constitutes a new legal order in international law for whose benefit the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals...[241]

Also in *Costa v ENEL*[242] the court held that community law will override any conflict at the national level by stating 'the transfer by the States from their domestic legal system to the Community legal system of rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights'. Furthermore, in *Solange I,*[243] the European Court held that community law will take precedence over many types of domestic law including constitutional law.[244] This demonstrates that the EU is supreme in almost all circumstances which were established before the European Communities Act in 1972 which provided the direct effect of community law and primacy over other laws.

Section 2(1) European Communities Act 1972 provides that the laws from the EU Treaties are to be enforced in the UK:

> …All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in

[241] Ibid
[242] Case C-6/64 *Costa v Enel* [1964] ECR I.
[243] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR I.
[244] Ibid.

> accordance with the Treaties are without further enactment to be given legal effect or used in the UK shall be recognised and available in law, and be enforced, allowed and followed accordingly.[245]

This should be read in conjunction with section 2(4) European Communities Act 1972 which implies that the UK should not pass any legislation which is contrary to EU law 'any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section'.[246]

Considering the doctrine of supremacy within the EU law, it was stated that:

> …every national court must, in a case within its jurisdiction, apply [Union] law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the [Union] rule.[247]

Moreover, the same principle was later confirmed by UK courts in *Factortame*[248] where it held that:

> If the supremacy within the European Community of Community Law over the national law of Member States was not always inherent in the EEC Treaty, it was certainly well established in the jurisprudence of the Court of Justice long before the UK joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary. Under the terms of the 1972 Act, it has always

[245] European Communities Act 1972, s 2(1).
[246] European Communities Act 1972, s 2(4).
[247] Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA [*1978] ECR 629 [21].
[248] *R v Secretary of State for Transport, ex parte Factortame* (No. 2) [1990] 3 WLR 818.

> been clear that it was the duty of a UK court, when delivering final judgment, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.

Lord Bridge stated that section 2(4) European Communities Act 1972 would be disapplied if it were deemed to be inconsistent with rights under EU law. Despite this, it became increasingly clear that supremacy even gave the courts the power to temporarily suspend Acts of Parliament and raise the question to the ECJ whether power is granted in relation to community law. In *Stoke on Trent v B&Q*[249] it stated 'a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule'. Additionally, the doctrine of supremacy was explained to state as follows: 'the Treaty of Rome is the supreme law of this country, taking precedence over Acts of Parliament. Our entry into the Community meant that (subject to our undoubted but probably theoretical right to withdraw from the Community altogether) Parliament surrendered its sovereign right to legislate contrary to the Treaty on the matters of social and economic policy which it regulated.'[250] From the many cases, it is evident that there is tension between the doctrine of supremacy of EU law and the doctrine of Parliamentary sovereignty.

4.3 The relationship between EU Law and International Investment Law

The relationship between EU law and international law is guided by several factors such as the CJEU, special relationship, norms and legal rules. Firstly, the CJEU adopts an approach which encourages the relationship between EU law and

[249] [1990] 3 CMLR 1 [30]
[250] Ibid 34

international law which is similar to the relationship between international law and national law. Secondly, the three-fold relationship between EU law, international law and EU Member States means that the EU's approach to international law will have an impact on the way in which the Member States' respond to international law. Thirdly, conflicts of norms and conflicts between courts and tribunals may arise concerning jurisdiction and interpretation of rules between EU law and international law.[251] Whilst European law is international law, the relationship became more apparent since the Treaty of Lisbon was enacted in 2009. This Treaty brought together the dimensions of international law and EU law such as the EU legal order and the international legal order. The function of the EU legal order has been suggested to be based upon the principle of 'autonomy'.[252] It was stated that the EU legal order is open to international law, has an effect on secondary EU rules and at times has no choice but to accept international law in exercising its roles as a global actor.[253] Furthermore, the relationship between international law and EU law has had an influence on the international legal order due to the role of the EU as a global actor.[254] This influence has been addressed by scholars to understand the impact of EU rules and how they could form a legitimate source of international law.[255] From this, it can be seen that there is a general acknowledgement of EU law in relation to the influence on international law. EU law can be considered as being unique due to its characteristics

[251] Katja Ziegler, 'The relationship between EU and International Law' 2013 University of Leicester School of Law Research Paper No 13-17, 2.
[252] T. Molnár, 'The Concept of Autonomy of EU Law from the Comparative Perspective of International Law and the Legal Systems of Member States' (2015) Hungarian Yearbook of International Law and European Law 433-459.
[253] J. Wouters and S. Duquet, 'The EU and International Diplomatic Law: New Horizons?', Hague Journal of Diplomacy, 2012, 31-49.
[254] I Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 JCMS 235- 258
[255] Ramses Wessel 'The Interface between EU and International Law, European Legal Studies Department, College of Europe, Bruges, 27-28 April 2017' 2, see also ; P. Nevill, 'The European Union as a Source of Public International Law' (2013) Hungarian Yearbook of International Law and European Law 281-295.

such as its application between states and within states. Therefore, EU law "cannot be fitted into traditional categories of international or constitutional law".[256] The special relationship is expressed by the international law framework of EU law.

4.4 Sovereignty to the EU

The EU is an international organisation which was created by the TFEU, TEU and the European Atomic Energy Community Treaty. These are all sources of EU law whether directly or indirectly. The EU Treaty system is one which embeds secondary norms of international law such as the rules of interpretation in the law of treaties such as Article 31 VCLT. However, the EU's international legal personality stemmed from Article 47 TEU which concerns the transfer of states' sovereignty to the EU.[257] Additionally, Article 3(5) TEU acknowledges and incorporates the role of the EU within the aims which states

> …In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter…[258]

Although States are not bound to give regard to international law within their legal orders, they have the ability to shape the relationship between an international

[256] H.L. Mason, The European Coal and Steel Community: Experiment in Supranationalism, Dordrecht: Martinus Nijhoff, 1955, at p. 126
[257] Katja Ziegler, 'The relationship between EU and International Law' 2013 University of Leicester School of Law Research Paper No 13-17 pp 5
[258] Article 3 (5), Consolidated version of the Treaty on European Union

organisation and international law within the legal order. Moreover, international law plays an important role as it allows for an interpretation of the rules where it is presumed that the Member States would not create a conflict of obligations exposing them to state responsibility.[259] These obligations arise from all sources of international law which includes treaties. In relation to treaties, the EU has the power to conclude treaties where it has the competence to act, and this can be explicitly or impliedly.

4.5 EU law supremacy in cases of conflict

The most fundamental principles of EU law involve its supremacy and are of significant importance for the concept of European governance. This is evidenced when the ECJ ruled that EU law has priority over national law both at the European and national levels.[260] This ruling suggests that unless EU law superseded national law, the entire European legal system would be undermined and therefore rules that where the two are in conflict, EU law overrides national law. The principle was developed as a result of the relationship between domestic and EU law not being clarified by treaty provisions. However, the Declaration 17 of the Lisbon Treaty addresses the principle of supremacy of the EU law over national law. This ensures the proper functioning of the EU which EU policies are unable to achieve as it needs to have priority in the legal system of the Member States. In order for legal systems to work, they have to manage the tension between EU supremacy and their claim to national supremacy. This is because different Member States have had different levels of difficulty in accepting the principle of supremacy due to constitutional traditions.

[259] C-377/98 Kingdom of the Netherlands v European Parliament and Council of the European Union (Directive on Biotechnolnumbogical Inventions) [2001] ECR I-7079, para. 55.
[260] Case C- 6/64 *Costa v ENEL* [1964] ECR 585.

4.6 Mechanisms through which the conflict is resolved

4.6.1 EU Law, the jurisdiction of ICSID and other Investor-State Dispute Resolution Institutions

Following the decision of *Achmea,* the CJEU deemed intra-EU BITs incompatible with EU law. This came as a shock to many especially as the AG Wathalet was in support of ISDS. The CJEU held that the TFEU "must be interpreted as precluding" provisions in international agreements between EU Member States that allow investors to bring proceedings against an EU Member State before arbitral tribunals. The CJEU's mainly focused on the interpretation and application of EU law. By this, they disagreed with AG Wathalet in finding tribunals established based on intra-EU BITs are different from domestic courts and are not able to refer questions to the CJEU for a preliminary ruling. The CJEU also mentioned that this would undermine the principle of autonomy of EU law and hold intra- EU BITs are incompatible with EU law.

This may lead to a different outcome which will depend on the location of the seat of the arbitration and the tribunal's view of whether they are bound to follow the decisions of the CJEU. However, uncertainty remains as to what States should do considering the CJEU decision. The European Commission is not one which States can rely on due to the fact that the Commission takes the view that intra-EU BITs are incompatible with EU law and has initiated a termination process. This process has been largely criticised as no alternative has been put in place. The proposal for an investment court system may be the way forward but has a long way before implementation. If the investment court system were in operation, then the investor would have no other option but to seek action before the State's own court.

However, it is important to note that the CJEU's decision does not affect investment treaties between non-EU States and EU Member States. As a result, non-EU jurisdictions are likely to benefit from this. ISDS provisions in BITs were created as a tool for investors to mitigate the political risk of investing in foreign States. Despite this, EU investors investing within the EU are now experiencing a lack of protection and dispute mechanism.

4.6.2 EU Law and the enforcement of decisions under the New York Convention

There are certain provisions of the EU Treaties such as the TEU and TFEU, where the CJEU ruled that an ISDS provision in an intra-EU BIT was invalid under EU law. Subsequently, there has been much discussion of the future of intra-EU BITs but none has covered the consequences of the decision for the arbitral awards rendered under these BITs. As the *Achmea* decision forms part of EU law and is binding on the national courts of all EU Member States, it reasonably follows that national courts within the EU must refuse to recognise and enforce non-ICSID awards based on ISDS provisions contained in intra-EU BITs. Furthermore, under Article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), national courts within the EU also have an obligation to recognise and enforce arbitral awards except where one or more of the seven grounds under Article V(2) New York Convention applies. It highlights the conflict that EU courts now have and explores the practicality of the *Achmea* decision in light of Article V New York Convention, focusing on two specific grounds such as violation of public policy and invalidity of the arbitration agreement.

After the decision in Achmea, the use of public policy[261] demonstrates the best way in which the New York Convention may resist the recognition and enforcement of an award with regard to an intra-EU BIT. Article V(2)(b) New York Convention states that the recognition and enforcement of an award 'may' be refused where such action would be "contrary to the public policy of that country" such as the State where recognition and enforcement are sought. Furthermore, the New York Convention does provide a definition for public policy but it allows national courts to derive the applicable standard for public policy from the *lex fori*.[262] It stresses that the idea of *lex fori* is different within the EU by virtue of the application and interaction of EU law vis-à-vis the national laws of EU Member States.

The CJEU ruled in *Eco-Swiss v Benetton,*[263] where the national courts of EU Member States faced an issue with public policy. The CJEU relied on the principle of equivalence in EU law, which meant that if a national court of a Member State allows the annulment or refusal of enforcement of an award for violations of national public policy, it must also allow violations of European public policy. The Court advanced its opinion of EU public policy and found that EU competition law "may be regarded as a matter of public policy within the New York Convention." The strict view taken by the CJEU in *Manfredi v Lloyd Adriatico Assicurazioni SpA*[264] showed that national courts cannot overlook violations of European public policy even though may be able to in light of domestic public policy under the New York Convention. This means that all national courts within the EU Member States are obliged to apply public policy and

[261] Ordre public
[262] Latin for 'the law of the country in which an action is brought'.
[263] Case C-126/97
[264] Case C-297/04 Manfredi v Lloyd Adriatico Assicurazioni SpA ECLI:EU:C:2006:461.

reject awards under intra-EU BITs. In effect, this should be applied narrowly to ensure its effectiveness and viability.

It is clear that the *Achmea* judgment has a number of damaging implications from the awards rendered, enforcement proceedings and annulment proceedings. Whilst public policy may seem to be the answer to EU national courts, a conflict arises between the Convention and EU legal order.

4.6.3 The relationship between ISDS and EU law

The use of amicus curiae in investment legal proceedings is a relatively new practice[265] even though the participation is well developed in domestic court cases, common law countries and US jurisprudence.[266] However, the expression 'amicus curiae' dates back to the early seventeenth century. An amicus curiae (friend of the court) is someone who is not a party to the case but presents legal arguments before a court or arbitral tribunal on the behalf of the party involved in the dispute. They may appear if both parties agree or if the court grants permission. In most cases, the amicus curiae assist the court by providing the court with information in support or against the party in the case. The aim is to bring the courts' attention to matters which address the common interest or third party interest. The arguments are normally presented to the court in the form of an amicus brief. Amicus curiae are permitted to file amicus briefs with the permission of the court and the discretion lies with the court in terms of considering the briefs. It is important to note that an amicus curiae is not considered as part of the proceedings unless they formally intervene. The practice of using amicus curiae has been used in arbitral tribunals to ensure more transparency and public

[265] *Methanex Corporation v. United States of America*, UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to intervene as "Amici Curiae," January 15, 2001.
[266] Georges Vallindas, 'Amicus Curiae: An overview of EU and national case law' e-Competitions Special Issue Amicus curiae 15 November 2018 1.

participation in matters concerning investment arbitration. Furthermore, the European Commission tried to intervene as amicus curiae in matters concerning investment arbitration, especially in transatlantic trade negotiations. Additionally, it is intriguing to find that following an examination of Foreign States' Amicus Curiae participation, the European Commission was listed as the most frequent filing in US courts followed by Canada and Japan.[267]

Under EU law, the idea of an Amicus Curiae was based upon the duty of the sincere co-operation owed by the Member States to the EU. This is further supported by Article 4(3) TEU imposes duties on the Member States:

> … 'Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.'

However, the concept of amicus curiae is found within Article 15(3) Council Regulation 1/2003, the Commission, acting on its own initiative, may submit written observations ("amicus curiae" observations) to courts of the Member States where the coherent application of Article 101 or 102 TFEU so requires. With the permission of the court in

[267] Marek Martyniszyn, Foreign States' Amicus Curiae Participation in U.S. Antitrust Cases, The Antitrust Bulletin 2016, Vol. 61(4) 611-642

question, it may also make oral observations. These observations include the intervention of a 'friend of the court'. Furthermore, the main purpose of the Regulation was to introduce amicus curiae as a strength of the Commission which will aid national judges with questions put forward. The conditions in which an amicus curiae could intervene are set out in Articles 81 and 82 EC.[268]

The EU Commission has a duty to assist national courts in putting forward its opinions on a point of law where a request has been made by a national judge. There are many examples in which national judges have requested intervention from the EU Commission. This includes *Eureko v Slovak Republic*,[269] *AES v Hungary*[270] and *Electrabel v Hungary*.[271] In *AES v Hungary*[272] and *Electrabel v Hungary,*[273] the tribunals permitted amicus curiae and granted written submissions. However, in *Eureko v Slovak Republic*,[274] the tribunal unusually requested amicus curiae submissions from two parties: the EU Commission and the Kingdom of the Netherlands. The EU Commission was requested to assist the tribunal whereby the claimant was invoking protections under a BIT concluded by two EU Member States e.g. intra-EU BIT. In addition, the Kingdom of the Netherlands was asked to assist and provide an interpretation in respect of the other party to the BIT. This was the first time in which

[268] Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C 101, 27.04.2004, p. 54-64.
[269] Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic)
[270] AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22
[271] Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19
[272] AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary, ICSID Case No. ARB/07/22
[273] Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19
[274] Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic)

the tribunal requested an amicus curiae submission *proprio motu*[275] and received a submission from a State.

4.7 The defence under these mechanisms

4.7.1 The EU approach

There are a number of ways in which the EU has established legal supremacy. The most known example is the nature of Treaties and the system of law. Although the wording of treaties can be viewed as somewhat vague, the judges of the CJEU take a purposive approach to judicial decision-making. This is because the need to consider solutions to the problem of conflicts of jurisdiction has been ongoing for many years and dates as far back as the TFEU. For example, Article 82(1)(b) TFEU states 'The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to … prevent and settle conflicts of jurisdiction between the Member States'. From this, it is clear that the European Parliament and the Council are bound to adopt legislative measures in order to achieve those goals. Traditionally, the regulation of conflicts of jurisdiction relating to ongoing investigations or proceedings has been minimal. Furthermore, it seems that the EU's effort has been impractical which is demonstrated by the Member States being unable to agree on a set of rules that would adequately deal with the matter. This meant that where a conflict of jurisdiction occurred, the Member State would apply legal instruments that were insufficient in resolving the issue because of their limited scope in absence of ratification or inadequate regulation. As a result, this purposive interpretation has been widely applied in judicial reasoning.

[275] Latin term for 'of its own motion'.

4.7.2. The efforts of amicus curiae

Upon analysis of the amicus curiae, it is evident that amici curiae no longer restrict their attempts to participate in arbitrations conducted in accordance with the NAFTA and the UNCITRAL Arbitration Rules or a BIT and the ICSID rules. Ten years after the initial request in *Methanex v United States*, [276] amicus curiae began to access proceedings by taking part in investor-state proceedings such as pleadings and oral hearings. Currently, there are four examples where amicus curiae have participated. In *Pac Rim v El Salvador*,[277] the claimant stated that regulatory measures taken by El Salvador stopped it from developing gold mining rights in breach of the investment protections in the Central America-United States-Dominican Republic Free Trade Agreement (CAFTA-DR). [278] The arbitration proceeded under the ICSID rules. Furthermore, a number of Non-governmental organisations (NGOs) sought permission jointly to file written submissions and make oral submissions as amicus curiae. However, the tribunal relied on provisions in the CAFTA-DR and the ICSID rules and granted leave to the NGOs to submit a joint written submission but refused them permission to appear and make oral submissions. In *Chevron v Ecuador*,[279] the claimants stated that domestic proceedings in Ecuadorian courts regarding remedial measures taken by them after their exit from an oil concession consortium violated the Ecuador-United States BIT. The arbitration proceeded under the UNCITRAL Arbitration Rules. Two NGOs jointly sought permission as amicus curiae to file a written submission, attend the hearing and either present oral submissions or respond to the tribunal's questions, and access key documents. The tribunal rejected the

[276] 2005
[277] ICSID Case No. ARB/09/12
[278] This was the first multilateral free trade agreement between the United States of America and smaller developing economies signed in August 2004. This agreement is on a smaller scale in comparison to the Northern American Free Trade Agreement (NAFTA).
[279] PCA Case No. 2009-23

requests based on access to the hearing was prevented by the prescription of "in camera" hearings in Article 25(4) UNCITRAL Arbitration Rules, and that NGOs were in any event not qualified to comment on the jurisdictional matters that were being decided. The third case is *Eureko v Slovak Republic*.[280] The claimant stated that regulatory measures taken by the State reversed an earlier liberalisation of the Slovak health industry market which had prompted the claimant to invest and in effect breached the Netherlands-Slovak Republic BIT. As in *Chevron v Ecuador*,[281] the consent to arbitrate in a BIT was relied upon in an arbitration where the UNCITRAL Arbitration Rules were applied. As mentioned earlier, the tribunal itself requested written amicus curiae submissions from the EU Commission and the Netherlands. However, this was done without recording its decision on the basis of the UNCITRAL Arbitration Rules which it issued such an invitation. Finally, in *Apotex v United States.*[282] The claimants complained that import restrictions imposed by the USA breached the national treatment, most favoured nation treatment and minimum standard of treatment provisions in the NAFTA. Most importantly, given the amount of time which had passed since the first request for amicus curiae participation in *Methanex v United States*,[283] this was the first time that amicus curiae sought to participate in an arbitration in which the consent to arbitrate was located in the NAFTA and which applied the ICSID Additional Facility Arbitration Rules. An individual lawyer and a management consultancy sought permission to file written submissions as amicus curiae. However, the tribunal rejected both requests for various reasons which included the lack of the ability of the amicus curiae to assist the tribunal or to show that they had a significant interest in the arbitration. Moreover, these cases

[280] PCA Case No. 2008-13
[281] PCA Case No. 2009-23
[282] ICSID Case No. ARB(AF)/12/1
[283] 2005

demonstrate that amicus curiae are now seeking to participate in non-BIT/ICSID and non-NAFTA/UNCITRAL arbitrations. They are going beyond institutions such as ICSID and NAFTA and identifying arbitrations of interest to them which have commenced pursuant to other combinations of consent to arbitrate and arbitral rules. This shows that amicus curiae are developing sophistication and diversity which allows them to track and seek to participate in the investor-State arbitration system more extensively.

4.8. Conflict of jurisdiction as applied to BITs

The relationship between the general body of European law[284] and international law obligations within BITs[285] has recently come under increased scrutiny largely due to an escalation in the number of investment treaty disputes involving intra-EU BITs.[286] Intra-EU BITs are essentially IIAs between two EU Member States that operate within the EU irrespective of the protections provided under EU law. The investment protections provided under EU law such as the free movement of capital[287] and freedom of establishment[288] are primarily found in the TFEU.[289] Prior to the enforcement of the Treaty of Lisbon, BITs were a matter of national competence. Following the TFEU, Article 207 TFEU allows the EU exclusive competence for FDI where the nature of competence had been developed to consider an EU policy for investment. It strengthens the EU presence in trade and empowers the Union to take external action with respect to most aspects of foreign investment regulation and

[284] Sometimes called EU *acquis*, which relates to the accumulated legislation, legal acts, and court decisions which constitute the body of European Union law.
[285] An agreement between two states for the protection of foreign investment.
[286] Intra-EU BITS concerns agreements that exist between EU Member States.
[287] Treaty on the Functioning of the European Union (TFEU), Art 63.
[288] Ibid, Art 49.
[289] Consolidated Version of the Treaty of Lisbon [2007] OJ C306/01.

facilitates the exercise of its current, fragmented and incomplete competence over foreign investment by establishing a single legal basis.[290]

4.8.1 Creation of BITs

A large majority of the disputes involving intra-EU BITs are between Central and Eastern European (CEE) countries and investors predominantly from Western Europe, involving countries such as the Netherlands, the UK and France. For example, in *Eureko v The Slovak Republic* (December 2012 – later *Achmea v The Slovak Republic*)[291] and *Micula v Romania* (December 2013),[292] the European Commission intervened in an investment arbitration but its arguments were deemed not compelling enough to discontinue the proceedings to hand jurisdiction over to an EU court or even admit absolute primacy of EU law over intra-EU BIT obligations. The European Commission stepped up its campaign against intra-EU BITs in September 2015 by initiating an administrative dialogue with twenty-one EU Member States over the termination of their intra-EU BITs.[293]

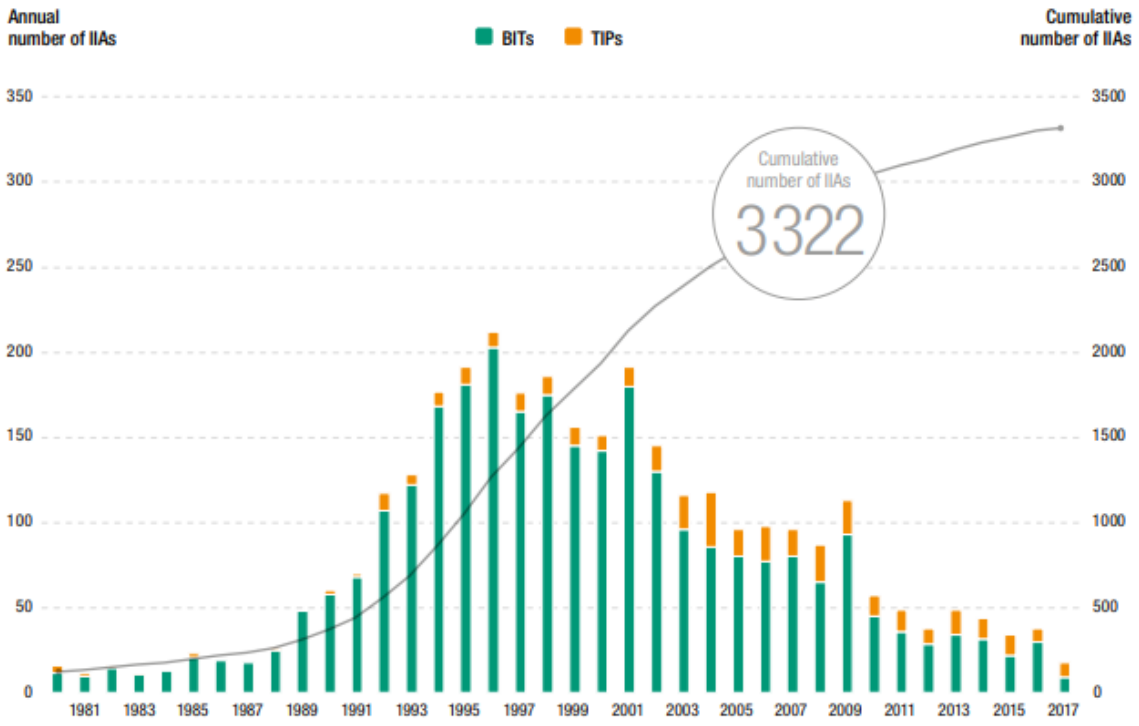
4.8.1.1 Trends in IIAs signed, 1980-2017

Since 2017, eighteen new IIAs were concluded: nine BITs and nine Treaties with investments provisions (TIPs).[294] In addition, fifteen IIAs entered into force. This brought the size of the IIA universe to 3,322 agreements (2,946 BITs and 376 TIPs) by year end (see figure 4.8.1.1.1 below). Furthermore, in 2017 the lowest number of

[290] Angelos Dimopoulos, 'The common commercial policy after Lisbon: Establishing parrallelism between internal and external economic relations?' [2008] 4 CYELP 109.
[291] PCA Case No. 2008/13 *Achmea B.V v The Slovak Republic* (formerly *Eureko B.V. v The Slovak Republic*).
[292] ICSID Case No. ARB/05/20 *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v Romania*, Decision on Jurisdiction and Admissibility (September 24, 2008).
[293] The aim was to seek their views on the issue. The other five states were already subject to infringement proceedings and two, Ireland (2012) and Italy (2013), had already terminated their intra-EU BITs.
[294] UNCTAD, 'World Investment Report 2018- Investment and new industrial policies' (*UNCTAD*, 2018) < https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf> accessed 1 February 2018.

IIAs were concluded since 1983. This meant that the number of effective treaty terminations (twenty-two) exceeded the number of treaty conclusions (eighteen) and the number of new Treaties entering into force (fifteen). However, between January and March 2018, three further IIAs were signed. From this, it is a clear indication that despite the EU's continued crackdown on IIAs, the agreements remain popular both within Europe and around the world.

Figure 4.8.1.1.1 Signed IIAS (1980-2017)



Source: ©UNCTAD, IIA Navigator[295]

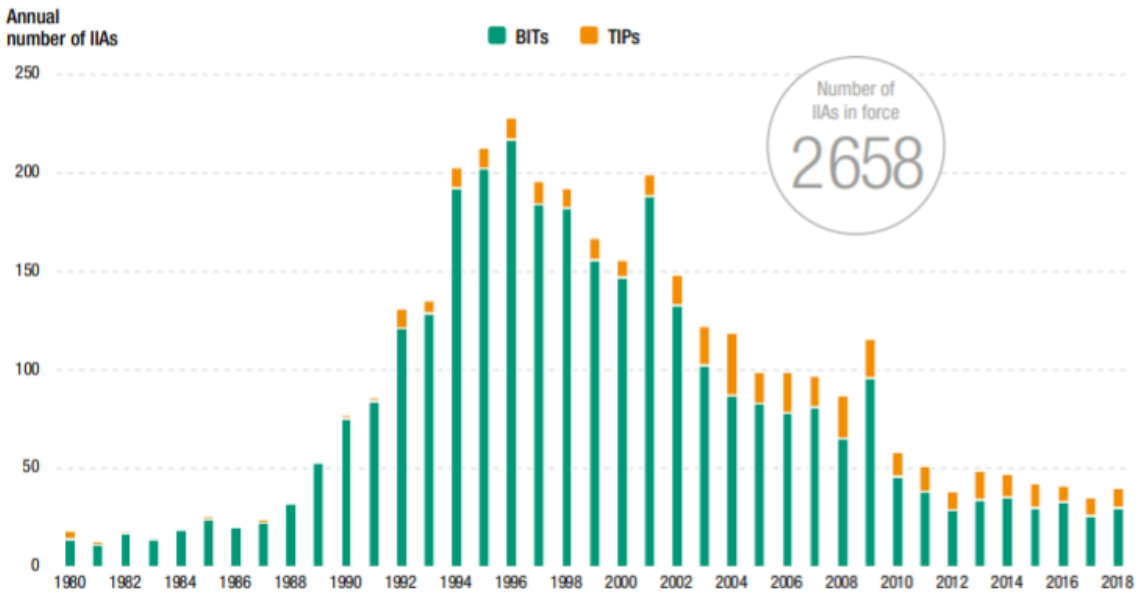
4.8.1.2 Trends in IIAs signed, 1980-2018

The graph below shows that in the year 2018, forty new IIAs were concluded: thirty BITs and ten TIPs. At least nine IIAs were in force in 2018. There were 2932 BITs agreed and 385 TIPs bringing the total size of the IIA universe to 3317 agreements.

[295] UNCTAD, 'World Investment Report 2018- Investment and new industrial policies' (*UNCTAD*, 2018) <https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf> accessed 1 February 2018.

However, 2658 BITs were in force and 24 IIAs were terminated in the same year. It is evident that the number of IIA terminations continued to rise. By the end of 2018, the number of effective terminations reached 309 which is 61% having occurred since 2010. In 2010, 178 new IIAs were concluded including 54 BITs and the total of agreements was 6092. The year 2010, saw a rapid treaty expansion of more than three Treaties being concluded every week.[296] In addition, countries continued to conclude IIAs, sometimes with novel provisions aimed at rebalancing the rights and obligations between States and investors and ensuring coherence between IIAs and other public policies.[297]

Figure 4.8.1.2.1 Signed IIAS (1980-2018)



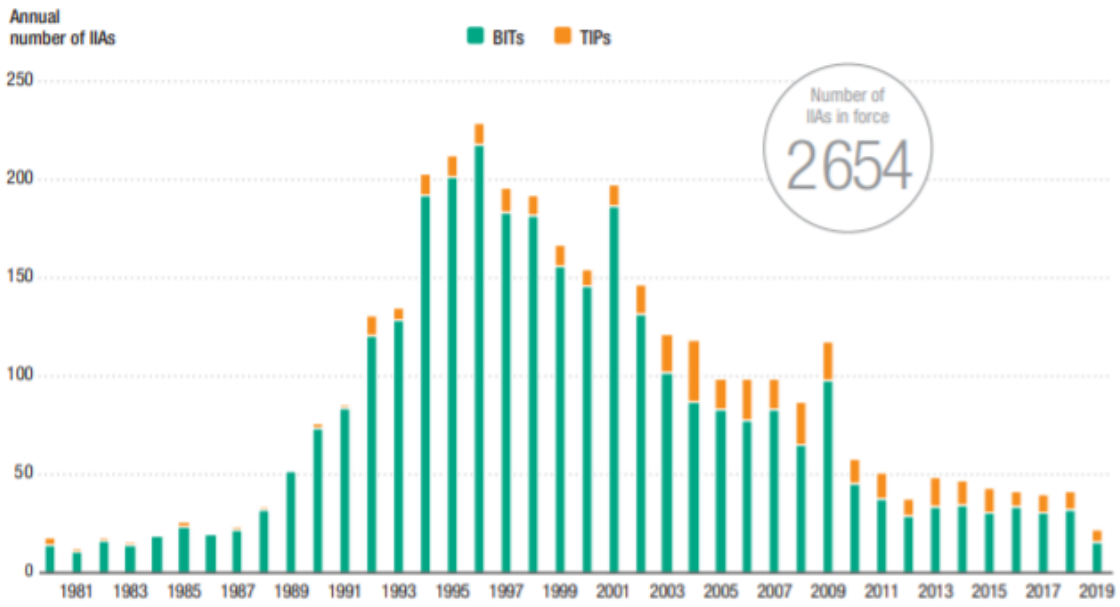
Source: ©UNCTAD, IIA Navigator[298]

[296] UNCTAD, 'World Investment Report 2011- Investment and new industrial policies' (*UNCTAD*, 2011) <https://unctad.org/system/files/official-document/wir2011_en.pdf > accessed 10 October 2020.
[297] Ibid.
[298] UNCTAD, 'World Investment Report 2018- Investment and new industrial policies' (*UNCTAD*, 2018) < https://unctad.org/en/PublicationsLibrary/wir2018_en.pdf> accessed 1 February 2018.

4.8.1.3 Trends in IIAs signed, 1980-2019

In 2019, there were significant developments which impacted policy developments concerning international investment which included Brexit. Some of these developments can be seen to reflect the changes within the IIA reform. In 2019, twenty-two countries concluded IIAs, bringing the total to 3284 agreements in the IIA universe (2895 BITs and 389 TIPs). At the end of 2019, at least 2658 IIAs were in force. However, the number of terminations continued to rise with twenty-four agreements coming to an end. Currently, there have been 349 terminations since 2010 which is the second time since 2017 that the number of terminations in a year exceeded the number of treaty conclusions.

Figure 4.8.1.3.1 Signed IIAS (1980-2019)



Source: ©UNCTAD, IIA Navigator[299]

[299] UNCTAD, 'World Investment Report 2020- Investment and new industrial policies' (*UNCTAD*, 2020) <https://unctad.org/system/files/official-document/wir2020_en.pdf> accessed 9 October 2020.

The overall statistics are compounded by the fact that almost 200 BITs are in force among the EU Member States. The European Commission's position is that these intra-EU BITs need to be terminated because they are incompatible with EU law. In the Commission's view, they overlap and conflict with the EU single market rules, thereby discriminating against investors from other EU Member States and interfering with the EU court's exclusive competence to ensure the full effect of EU law (e.g. through the substantive protection they provide and due to ISDS). In 2015, the Commission initiated infringement proceedings against five Member States for failing to terminate their intra-EU BITs (i.e. the Austria–Czech and Slovak Federal Republic BIT (1990), the Netherlands–Czech and Slovak Federal Republic BIT (1991) and the Sweden–Romania BIT (2002)), followed by a reasoned opinion to these Member States issued in September 2016, formally requesting them to terminate the BITs under investigation. In parallel, the Commission has also initiated separate "EU Pilot" proceedings against twenty-one other Member States. With the latter, the Commission seeks to achieve compliance without having to resort to formal infringement proceedings. The Commission has urged the Member States not only to terminate their intra-EU BITs, but also to make sure that all the "legal effects" of those BITs are likewise terminated. To evidence this, Appendix A demonstrates the number of intra-EU BITs which are currently in force, terminated by consent or unilaterally denounced.

4.9. Termination of BITs

Some Member States have already terminated all their intra-EU BITs (e.g. Ireland, Italy), and termination efforts are currently under way or being considered in several others (e.g. the Czech Republic, Romania, the Slovak Republic). Certain Member States have sought to propose compromise solutions going forward and to retain aspects of the status quo, notably ISDS. For example, in April 2016, Austria, Finland,

France, Germany and the Netherlands presented to the Trade Policy Committee of the EU Council a “Non-paper” suggesting such a compromise, which envisages the conclusion of an agreement among all EU Member States in order to coordinate the phasing out of existing intra-EU BITs, to codify existing investor rights under EU law, and to provide protection to EU investors further to the termination of these BITs, including a binding and enforceable settlement mechanism for investment disputes as a last resort to mediation and domestic litigation. The proposal also refers to the parallel elimination of survival clauses in the respective intra-EU BITs.

In January 2019, the EU Member States including the UK issued three political declarations announcing their intention to terminate all their intra-EU BITs by 6 December 2019. This draws upon the decision on the *Achmea* case from the Court of Justice of the EU where it was ruled the investment arbitration clauses within intra-EU BITs are incompatible with EU law. This judgment meant that European investors cannot bring a claim against the EU Member States for expropriation, discrimination or unfair treatment where damages were suffered by the investor. Since the decision in *Achmea*, the European Commission has been encouraging the Member States to terminate all their intra-EU BITs as soon as possible. Although some Member States in Central and Eastern European Member States have taken the initiative to terminate their intra-EU BITs, approximately 190 Treaties are still in force today. Additionally, in January 2019, Hungary rejected the application of the *Achmea* judgment to the Energy Charter Treaty altogether.

Furthermore, in October 2019, the European Commission announced that the EU Member States had reached a plurilateral treaty for the termination of all intra-EU

BITs.[300] This followed the ruling in *Achmea* which took the Members States two years to negotiate such a Termination Agreement. The announcement came a few days before the EU adopted a decision to defer the date for the UK to leave the EU from 31 October 2019 to 31 January 2020. On 5 May 2020, 23 Member States of the EU signed an Agreement for the Termination of all intra-EU Bilateral Investment Treaties which was concluded by the majority of EU Member States and entered into force on 29 August 2020. Annex A lists 125 intra-EU BITs currently in force that will be terminated upon entry into force of the agreement for the relevant Member States and clarifies that their sunset clauses will also be terminated thirty days after the date the depositary receives the second instrument of ratification by the Member State.[301] Annex B lists 11 terminated intra-EU BITs whose sunset clauses will also cease to produce a legal effect upon entry into force of the agreement for the relevant Member States.

It is important to note that the Termination Agreement goes far beyond a usual termination by terminating the sunset clauses of BITS which are already terminated and prevents them of having legal effect.[302] Sunset clauses provide protection to an investor by extending the life of a treaty after its termination date such as fifteen years post termination BIT protection. The Termination Agreement can be seen as a measure which destroys the expectations of current foreign investors who have protection through sunset clauses within intra-EU BIT. As a result, the investors may

[300] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union.
[301] Article 15 and 16, Agreement for the Terminaton of Bilateral Investment Trreaties between the Member States of the European Union.
[302] Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, Art 3.

turn to international law[303] and supranational law[304] to oppose the Termination Agreement.[305]

Whilst the EU Member States negotiated a plurilateral agreement, it focuses on two main issues such as how the existing intra-EU BITs will be terminated and how new, pending and concluded arbitration proceedings will be dealt with. This Agreement was not welcomed by all Member States as two Member States (the UK and Finland) refused to sign it, forcing the EU Commission to issue infringement notifications urging them to make the necessary steps to remove all intra-EU BITs bearing in mind its incompatibility with EU law. Though the UK has now formally left the EU, EU law continued to apply to the UK until the Brexit transition period ended on 31 December 2020. As the UK did not terminate intra-EU BITs before the transition period, its intra-EU BITs are now extra-EU BITs which fall outside the scope of the *Achmea* judgment.[306]

Despite the commitment[307] to terminating intra-EU BITs, it is anticipated that this will ensure a smooth and swift ratification process by providing a structured between the parties involved in pending arbitrations with a view to entering into a settlement. As a result of the structured dialogue, the investor will be expected to suspend the proceedings against the State but there is no obligation imposed on the State to enter into the structured dialogue. If the Member State is a party to judicial proceedings

[303] Estoppel.
[304] Legitimate expectations.
[305] Devin Bray and Surya Kapoor, 'Agreement on the Termination of Intra-EU BITs: Sunset in Stone?' (4 November 2020) <http://arbitrationblog.kluwerarbitration.com/2020/11/04/agreement-on-the-termination-of-intra-eu-BITs-sunset-in-stone/> accessed 5 February 2021.
[306] At the time of writing, the United Kingdom currently has 10 intra-EU BITs in force: Hungary (1987), Slovenia (1996), Croatia (1997), Bulgaria (1995), Romania (1995), Latvia (1994), Estonia (1994), Lithuania (1993), Czech Republic (1990) and Slovakia (1990).
[307] European Commission, Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection (17 January 2017), < https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en> accessed 14 February 2021.

concerning an arbitral award based on the terminated intra-EU BIT, it must ask the competent national court to set aside the arbitral award, annul or refrain from recognising and enforcing it. From this, it is clear that the provisions are centred on investors who are considering investor-State arbitration.

Although the Termination Agreement mentions the inapplicability of intra-EU BITs, it also states that any intra-EU BIT concluded before the Achmea judgment (6 March 2018), will not be affected. This means that any arbitral awards or settlements prior to the *Achmea* judgment will remain unaffected and this will take into account awards that have been issued before 6 March 2018 but not yet enforced or executed if the investor undertakes not to start proceedings for its recognition, execution, enforcement or payment in a Member State or in a third country or, if such proceedings have already started, to request that they are suspended. Despite this, pending disputes will not be handled in the same manner. Instead, any arbitration proceedings that were initiated before the *Achmea* judgment (6 March 2018), will be covered by "structured dialogue". The Termination Agreement describes the "structured dialogue" as one which will allow investors to commence a settlement procedure with the Member State in question, but this must be within six months from the termination of a particular BIT. This is supposed to be supervised by an impartial facilitator whose role will seek to find an out of court solution between the parties. The facilitator will be agreed upon between the parties (investor and Member State). However, the facilitator should have an in depth knowledge of Union law but not investment law. Although, the appointment of the facilitator is left to the parties, in the event that the parties do not agree then an appointing authority will be responsible for appointing the facilitator. The facilitator is then expected to reach a settlement within six months, but this can be extended with the agreement of the parties. Any agreements reached should take into consideration

the rulings of the Court of Justice of the EU and decisions from the European Commission. This will ensure that cases such as *Micula* are not ignored by the facilitator.[308]

In relation to the Termination Agreement, whilst the settlement should be impartial and confidential, it remains unclear as to what will happen if an agreement has not been reached. This provides uncertainty as to whether the investor is permitted to continue arbitral proceedings or whether the dispute is terminated. The Termination Agreement refers to access to national courts of the Member States within six months of terminating the specific BIT, although the time limits for bringing the claim under domestic law may have expired. It can be argued that the Termination Agreement does not give much scope for investors to bring their claim before domestic courts of Member States as it will not give rise to any new judicial remedies that are not available under the applicable national law.

Furthermore, the Termination Agreement means that any intra-EU BIT proceedings after the *Achmea* judgment will be void by the agreement even though most intra-EU BITs are in force and legally binding on the Member States. Therefore, it is important to note that the Termination Agreement does not apply to intra-EU Energy Charter Treaty disputes, but the agreement seems to suggest it will deal with such disputes through the modernisation process of the ECT.[309] However, this may be viewed as a problematic solution because countries such as Spain and the other EU Member States are facing a number of intra-EU ECT claims. As a result, the States have not yet managed to convince the arbitral tribunals to decline their jurisdiction or dismiss

[308] Of course, this case concerned a State aid decision that was made by the European Commission.
[309] International Energy Charter, 'Approved topics for the modernisation of the Energy Charter Treaty' <https://www.energychartertreaty.org/modernisation-of-the-treaty/> accessed 16 February 2020

pending cases.[310] It can be argued that Member States may seek to discharge their legal obligations imposed by the ECT. Nevertheless, the CJEU applied its *Achmea* judgment to *Komstroy*[311] by confirming that the resolution of intra-EU disputes by ISDS on the basis of exclusive arbitration clauses of bilateral or multilateral investment treaties such as the ECT is incompatible with EU law. Such disputes must be resolved by a judicial body which forms part of the EU judicial system, which is subject to EU law and under the obligation to refer questions on the interpretation or validity of EU law to the CJEU. The CJEU explained that in order to preserve the autonomy of EU law, as well as its effectiveness, national courts of EU Member States may make a preliminary reference to the CJEU pursuant to Article 267 TFEU. This referral procedure was described as the "keystone" of the EU judicial system with the "objective of securing the uniform interpretation of EU law, thereby ensuring its consistency, its full effect and its autonomy".

4.10. EU Jurisdiction issue: Lessons from other areas of law

4.10.1. Jurisdiction within Criminal Law

The most important obstacle to be overcome stems from the existence of different Criminal and Procedural laws between the Member States. Although the principle of mutual recognition exists, the lack of uniformity in Criminal and Procedural laws passed by Member States gives rise to situations that result in unlawful limitations of fundamental rights of EU citizens such as defence rights and appear incompatible with the objective of freedom. Therefore, conflicts of jurisdiction in criminal matters do not have mere factual content but can be either positive or negative. This relates to

[310] Thomson Reuter, 'The Achmea issue and ECT claims: where do things stand?' <http://arbitrationblog.practicallaw.com/the-achmea-issue-and-ect-claims-where-do-things-stand/> accessed 16 February 2020.
[311] Case C-741/19 *Republic of Moldova* v *Komstroy LLC* ECLI:EU:C:2021:655.

whether a State should have or exert jurisdiction over a case or not. Positive and negative conflicts of jurisdiction arise in concrete cases (adjudicative jurisdiction) but if the settling of such conflict supposes an actual situation, then the prevention of such conflicts can be done by addressing legal systems and imposing duties to protect specific offences or by reducing overlap between those systems.

The *ne bis in idem*[312] principle may be viewed as a positive conflict of jurisdiction settling mechanism by establishing a rule that where there is a positive conflict of jurisdiction within the EU, the decision that finally disposes of the case on one State prevents all other interested States from exerting jurisdiction. This is to ensure that a State is not subjected to a second trial if already convicted or acquitted for the same facts in another Member State. Whilst the ECJ deemed the *ne bis in idem* to be sufficient it stressed that its application is not based on harmonisation or approximation of the criminal laws of the Member States where further prosecution is barred. Also, the *ne bis in idem* principle necessarily imply, regardless of the methods used to impose the penalty, that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law was applied.[313] However, the principle raises questions in relation to ongoing investigations and may suffer abuse leading to an undesirable situation where preference to prosecute is given to the jurisdiction which acts promptly or first arrives at a final decision in the matter.

[312] Latin expression. The *ne bis in idem* principle is laid down in Article 50 of the Charter of Fundamental Rights of the European Union: "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

[313] Joined Cases C-187/01 and C-385/01 Criminal proceedings against Hüseyin Gözütok and Klaus Brügge para 33.

4.10.2. Jurisdiction within Public International Law

It can be argued that some new Member States (respondents) recognised the incompatibility that exists between intra-EU BITs and EU law, in that the intra-EU BIT would terminate upon accession to the EU and investment tribunals would not have jurisdiction. This view derives from Article 59 VCLT which discusses the termination or suspension of the operation of a treaty implied by the conclusion of a later treaty. In support of this, in *Eureko*,[314] Article 59 VCLT was subject to Article 65 VCLT which concerns the impeachment of a valid treaty, termination, withdrawal and suspension. Despite this, it fails to mention how the automatic termination of treaties will operate. However, Article 59 VCLT gives rise to an implied termination of a treaty where a later treaty has been concluded. For this to apply the steps are twofold: firstly, both treaties should relate to the same subject matter and lastly, the parties to the treaties must have either intended for the matter to be governed by the latter treaty or the treaties must be so incompatible that they are not capable of being applied at the same time. Article 59 VCLT seems to apply a strict approach by suggesting two treaties are capable of being compared in relation to the subject matter.[315] Consequently, these respondents argued that EU law and intra-EU BITs covered the same subject matter and the provisions would correspond with the four freedoms.[316]

They argued that the substantive provisions in BITs would correspond to the guarantees contained in the four freedoms. However, this view differed as in *Eastern Sugar*[317] and *Eureko*, the tribunal agreed that guarantees within BITs are broader and

[314] Achmea B.V. v. The Slovak Republic, UNCITRAL, PCA Case No. 2008-13 (formerly Eureko B.V. v. The Slovak Republic)
[315] Anthony Aust, *Modern Treaty Law and Practice,* (2nd edn, Cambridge University Press 2007) 229.
[316] Free movement of Goods, Free movement of People, Freedom of Services and Freedom of movement of Capital.
[317] *Eastern Sugar v Czech Republic,* Partial Award, para 170

more specific than those under EU law. Alternatively, the four freedoms[318] were seen to be more of a starting phase of an investment in a standard intra-EU BIT, where a state could sue an investor. This argument was further supported in *Eureko*, where the tribunal rejected the notion that two treaties could cover the same subject matter and that the conditions under Article 59 VCLT were satisfied. They stated that the protection which BITs provide is not incompatible with EU law but instead complements it.[319]

The Tribunal in *Eureko* held, in this context:

> …Nor can it be said that the provisions of the BIT are incompatible with EU law. The rights to fair and equitable treatment, to full protection and security, and to protection against expropriation at least, extend beyond the protections afforded by EU law; and there is no reason why those rights should not be fulfilled and upheld in addition to the rights protected by EU law.[320]

In the same vein, the tribunals in *Eastern Sugar* and *Eureko* ruled that the treaties did not relate to the same subject matter and that Article 30 VCLT does not apply. In addition, the treaties were not incompatible and even if they were, the question to consider would be the applicable law and not the jurisdiction.

In relation to the possible incompatibility between investor-State arbitration and EU law, the tribunals have found no prohibition of investor-State arbitration in the treaties and thus there is no element of incompatibility.

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[318] Free movement of Goods, Free movement of People, Freedom of Services and Freedom of movement of Capital.
[319] PCA Case No. 2008/13 *Achmea B.V v The Slovak Republic (formerly Eureko B.V. v The Slovak Republic).*
[320] *Eureko v. Slovakia,* Award on Jurisdiction, Arbitrability and Suspension, para 263.

4.10.3. Jurisdiction within International Trade Law

Whilst the decision of *Achmea* only concerns intra-EU disputes, the EU Commission has made it clear that different legal considerations apply to external EU investment policies. Furthermore, the EU Commission has replaced investor-State arbitration in the EU and investment agreements which have been replaced by the ICS included in the CETA, EU-Singapore Free Trade Agreement, EU-Vietnam Free Trade Agreement, EU-Mexico Trade Agreement and the negotiations with third countries. The ICS offers the independence and impartiality of a permanent court. It represents a new approach to dealing with investment related disputes by eliminating the risk of abuse and safeguarding the right to regulate in the public interest.[321] In implementing the ICS, the Commission is seeking support for a Multilateral Investment Court. This discussion is taking place with the Working Group III of UNCITRAL where the Member States have set out how a multilateral investment court could be initiated. These discussions are due to take place over a number of dates such as 14 October 2019, 20 January 2020, 5 October 2020, 8 February 2021, 4 May 2021 and beyond.

However, the courts are considering legal issues which relate to the EU's investment policy which is a reaction to the framework procedure initiated by Belgium to seek the court's opinion regarding the ICS under the recent CETA. It is important to note that the elements of the ICS can be found in CETA but have not yet been ratified to apply in all EU Member States. The trade agreement (CETA) includes a commitment to ensure the system is operational and has a reformed approach to investment dispute settlement. The proposals focus on rules which sets out the functioning of the Appellate Tribunal to secure an effective appeal function. The Appellate Tribunal is to

[321] European Commission, 'Commission presents procedural proposals for the Investment Court System in CETA' < https://trade.ec.europa.eu/doclib/press/index.cfm?id=2070> accessed 22 February 2020.

have six Members for a period of nine years which is non-renewable and this is to ensure adherence to adversity of diversity and equality principles. The membership for the tribunal would be chosen by two nominations from Canada, two nominations from the EU and the remaining nominations from the EU or Canada. The Appellate Tribunal would hear awards rendered by the Tribunal at first instance and if necessary apply its findings to render a final award. Additionally, the proceedings would not last longer than 180 days but if the Tribunal deemed it necessary then it may be possible to extend up to 270 days. However, if a Member State within the EU or Canada has serious concerns in regards to the interpretation of CETA relating to an investment issue, then that party may refer the matter in writing to the special CETA Committee on Services and Investment. Following this, the parties must enter into consultations within the committee to decide the matter and a recommendation may be sent to the CETA joint committee to make a decision which is binding upon the Tribunal and Appellate Tribunal. The proposals put forward by the Commission will need approval by the Council and Member States which will then need Canada's formal agreement and are not enforceable until the ratification of CETA by all of the Member States.

Despite all of this, the EU and its trade policy concerning third countries seek to depart from investor-State dispute settlement based on ad hoc arbitration.

4.11. International Investment Law Reform: what is the future of EU Legal supremacy?

In terms of the doctrine of EU law supremacy, there is no doubt about the associated respect and reliance by the court. Despite this, the ongoing conflict of jurisdiction is prominent and one which continues to be at the heart of challenges. In support is the outcome of *Achmea,* which changed the outlook of the ITA. This is because Arbitral tribunals find it difficult to restrict or bypass its impact. The decision in *Achmea*

championed the idea that the EU Commission needed to reconsider its approach to intra-EU ITAs. The work of the EU Commission is active with its view to take part in pending ITA cases which challenge the jurisdiction of arbitral tribunals based on *Achmea*. Furthermore, the Termination Agreement displays the height of the European Commission's and some Member States' efforts to terminate all intra-EU investment arbitration proceedings under the legal order. On its surface, the Agreement attempts to put an end to all pending and new arbitration proceedings initiated after the *Achmea* decision.

Whilst the Termination Agreement provides transitional measures such as a structured dialogue between the investor and the Member State with a view to entering into a settlement. There is no obligation for the State to participate in the structured dialogue. Also if the Member State is a party to judicial proceedings where an arbitral award was issued on the basis of a terminated intra-EU BIT, it must ask the competent national court to set the award aside, annul or refrain from recognising and enforcing it. These measures may be viewed as unattractive by investors due to the practical challenges in Articles 9 and 10 of the Agreement. Article 9 requires facilitators under the "structured dialogue" procedure to have an in-depth knowledge of EU law. This requirement is not an easy fit with the fact that most non-EU investment tribunals have refused to consider EU law in rendering their awards, which may make the awards easier to enforce in non-EU jurisdictions. Article 10 of the Termination Agreement provides that investors in pending arbitrations are entitled to access domestic courts. However, this entitlement is conditioned upon investors waiving their rights under BITs which can be seen as a drastic surrender of extensive investment protections

contained in investment treaties.[322] Moreover, the question remains as to whether the legal expectations of investors and their interests within the BITs are adequately respected. In addition, the fact that sunset clauses and post-*Achmea* disputes are declared null and void as of 2007 does not conform with the rule of law nor the VCLT. Article 70(1)(a) VCLT discusses the consequences of the termination of a treaty, and it provides that "[u]nless the treaty provides otherwise … the termination of the treaty … releases the parties from any obligation further to perform the treaty." But the sunset clauses "do provide otherwise," raising the question of whether a tribunal might hold a BIT party to compliance with the BIT for the duration of the sunset clause notwithstanding its purported termination. Further Article 70(1)(b) VCLT provides that the termination of a treaty "does not affect any right or legal situation of the parties created through the execution of the treaty prior to its termination." A tribunal might consider a sunset clause to fall within the scope of this language, and thus conclude the termination of the sunset clause is invalid.[323]

Most importantly, the aim of the sunset clause is to take effect once the BIT is terminated. Essentially, if the Member States decide against the sunset clause operating in such a manner, then the Member State would need to remove all sunset clauses within their BITs and terminate any Treaties which may have been modified. Whilst the Termination Agreement will end the intra-EU BITs disputes, doubt still remains as to the conformity with the rule of law and the expectation of investors by way of clarification by domestic courts and the CJEU.

[322] Naina Gupta and Yarik Kryvoi, 'Termination of Intra-EU BITs: Legal and Practical Consequences for Pending and Future Disputes' (11 June 2020) < http://kryvoi.net/blog/termination-of-intra-eu-bits-legal-and-practical-consequences-for-pending-and-future-disputes/> accessed 11 October 2021.
[323] John Blanck, 'European Union Member States Sign Treaty to Terminate Intra-EU Bilateral Investment Treaties' (2020) 24 (18) ASOIL< https://www.asil.org/insights/volume/24/issue/18/european-union-member-states-sign-treaty-terminate-intra-eu-bilateral> accessed 18 July 2021.

4.12. Conclusion

It is clear from the evidence within this chapter that the legal framework is flawed and there are considerable problems resulting from it such as the mechanism to resolve the conflict. This chapter has discussed the conflict of jurisdiction within international law and the level of impact e.g. terminations of intra-EU BITs and suggests lessons to be learned from other areas of law. The next chapter will undertake a more detailed examination of the problems within the legal framework by analysing a single exploratory case study. By highlighting the challenges based on the *Achmea* decision a broad picture of the problematic areas of the question with conflict of jurisdiction in these IIAs will be shown. This is because, as discussed in chapter three, *Achmea* presents all of the problems. It is thus a crucial case study as the problems are symptomatic of those seen in other comparable cases. Later chapters will address its role in finding solutions to resolving the conflict issues pertaining to intra-EU BITs. However, chapter five will discuss the problematic aspects of the conflict of jurisdiction with intra-EU BITs as demonstrated in the case which serves as the prototype for issues across the jurisprudence- *Achmea.*

Chapter 5: Case Study: Achmea

5.1. Introduction

The *Achmea* judgment is a ground breaking case where the CJEU set the first precedent concerning the incompatibility of EU law contained within intra-EU BITs. This case is the first step toward major changes which will affect intra-EU ITA and establish the legal status of all intra-EU BITs. Before this judgment, the legality of intra-EU BITs had been questioned. However, this judgment now forms a part of EU law.[324]

5.2. Background to the challenges posed

In 1991, the Netherlands and Slovakia (Slovakia formerly part of Czechoslovakia before the separation of the two States) [325] concluded an agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic with effect from 1 October 1992.[326] Czechoslovakia was dissolved becoming two countries: the Czech Republic and Slovakia. Therefore, following its independence on 1 January 1993, Slovakia confirmed that the BIT would still apply.[327] The BIT provided for provisions which state that all disputes between a Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if possible, be settled amicably.[328] Due to its independence, this meant that Slovakia succeeded in the country's rights

[324] Clyde and Co, 'Slovak Republic v Achmea: See you in Court', (Clyde and Co, 23 March 2018) <https://www.clydeco.com/insight/article/slovak-republic-v-achmea-see-you-in-court> accessed 12 June 2018.
[325] Separated on 1 January 1993.
[326] Netherlands – Slovakia BIT (1991).
[327] Allen and Overy, 'Investor-State arbitration under intra-EU BITS – the German Federal Court of Justice makes a preliminary reference to the CJEU', (Allen and Overy, 25 May 2016) <http://www.allenovery.com/publications/en-gb/Pages/Investor-State-arbitration-under-intra-EU-BITS.aspx> accessed 23 April 2018.
[328] Netherlands – Slovakia BIT (1991), Art 8.

and obligations under the BIT.[329] Furthermore, Slovakia acceded to the EU in 2004 and it was not until then that Slovakia extended its sickness insurance market to private investors. Achmea, an undertaking belonging to a Netherlands insurance group, set up a subsidiary in Slovakia intending to offer private sickness insurance services. However, in 2006 Slovakia partly reversed the liberalisation of its sickness insurance market and prohibited in particular the distribution of profits generated by sickness insurance activities.[330]

Later in 2008, *Eureko* (later *Achmea*)[331] brought arbitration proceedings against Slovakia pursuant to Article 8 of the BIT, stating that legislative measures of Slovakia caused it damage and were not in line with EU principles.[332] As the parties' chosen place of arbitration was Germany, German law would apply to the arbitration proceedings. Subsequently, Slovakia raised an objection stating that the arbitral tribunal had a lack of jurisdiction to hear the case. It further added that its accession to the EU in 2004 meant that Article 8(2) of the BIT was incompatible with EU law. According to Article 8(2) of the BIT :

…each Contracting Party hereby consents to submit a dispute referred to in paragraph (1) of this Article, to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date either party to the dispute requested amicable settlement…[333]

[329] European Commission, 'The arbitration clause in the Agreement between the Netherlands and Slovakia on the protection of investments is not compatible with EU law', (Court of Justice of the European Union, 6 March 2018) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180026en.pdf> accessed 17 April 2018.
[330] Ibid.
[331] PCA Case No. 2008/13 *Achmea B.V v The Slovak Republic* (formerly *Eureko B.V. v The Slovak Republic*).
[332] Ibid.
[333] Netherlands – Slovakia BIT (1991).

However, by an interlocutory arbitral award in 2010, the arbitral tribunal dismissed the objection stating that it did have jurisdiction to hear the case. As a result, Slovakia made an application to set aside the award which was unsuccessful at first instance and on appeal.

By 2012, the arbitral tribunal found that Slovakia had infringed the BIT and ordered Slovakia to pay *Achmea* damages amounting to €22.1 million.[334] Nonetheless, Slovakia brought an action before the German court to challenge the tribunal's decision on jurisdiction and set aside the award, which was unsuccessful. The German court dismissed the action and in 2013 Slovakia commenced proceedings with the Higher Regional Court of Frankfurt to have the award set aside. It had been noted that since the accession of Slovakia to the EU in 2004, the BIT had constituted an agreement between the Member States which meant that EU law takes precedence over the BIT provisions. However, Slovakia stated that the arbitration clause in the BIT did not comply with the provisions within the TFEU.[335] The Higher Regional Court of Frankfurt dismissed the application to set aside and ruled that disputes between the EU Member States and investors do not fall under the scope of EU law. As a result, Slovakia appealed to the Federal Court of Justice, Germany (BGH).

In 2016, the BGH stayed the proceeding and requested a preliminary ruling on the compatibility with EU law, more specifically Articles 344, 267 and 18 TFEU with the arbitration agreements. The BGH referred to three questions: (1) Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between the Member States of the EU (a so-called intra-EU BIT) under

[334] PCA Case No. 2008/13 *Achmea B.V v The Slovak Republic* (formerly *Eureko B.V. v The Slovak Republic*).
[335] TFEU, Art 18, 267 and 344.

which an investor of a Contracting State, in the event of a dispute concerning investments in the other Contracting State, may bring proceedings against the latter State before an arbitral tribunal where the investment protection agreement was concluded before one of the Contracting States acceded to the EU but the arbitral proceedings are not to be brought until after that date? If Question 1 is to be answered in the negative: (2) Does Article 267 TFEU preclude the application of such a provision? If Questions 1 and 2 are to be answered in the negative: (3) Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?.

The BGH was of the opinion that Article 344 TFEU only applied to disputes between two EU Member States and not to EU Member States and investors. In addition, the arbitration agreements concluded intra-EU BITs may not be classed as an infringement of Article 267 TFEU even if the review of awards is limited to violations of *ordre public*.[336] In relation to Article 18 TFEU, the BGH supported the view of referring issues of discrimination to the CJEU but stated that access to investment arbitration should be open to investors from all Member States.

In 2017, the AG[337] delivered his much-awaited opinion concerning the preliminary ruling requested from BGH regarding the compatibility of the 1991 BIT between the Netherlands and Slovakia. The AG commented that "the question is of fundamental importance in the light of the 196 intra-EU BITs currently in force and the numerous arbitral procedures between investors and Member States in which the European Commission has intervened as amicus curiae in order to support its argument that

[336] Also known as public policy. Sebastian Lukin (Schoenherr) and Anne-Karin Grill, 'The End of Intra-EU BITs: Fait Accompli or Another Way Out?' (Kluwer Arbitration Blog, 16 November 2016) < http://arbitrationblog.kluwerarbitration.com/2016/11/16/the-end-of-intra-eu-BITs-fait-accompli-or-another-way-out//>accessed 23 April 2018.
[337] Wathelet.

intra-EU BITs are incompatible with the FEU Treaty, an argument which the arbitral tribunals have systematically rejected as unfounded."[338] The AG concluded that the BIT and dispute resolution method were not incompatible with EU law and do not conflict with Articles 344, 267 and 18 TFEU. This outcome was of major importance as it would provide certainty and a solution to the issue of compatibility. However, the opinion was shocking given the fact that the AG took the opposite view of the European Commission.

The AG followed the position of the German court: firstly, the BIT did not constitute discrimination on grounds of nationality prohibited by EU law and as a result, does not violate Article 18 TFEU (by granting preferential treatment to investors).[339] Therefore, while investors from the Netherlands are permitted by the clause to submit an investment dispute within Slovakia to the arbitral tribunal, other Member States would benefit from equivalent protection of the BITs concluded with Slovakia.[340] The AG added that investors who have concluded agreements with Slovakia would not suffer discrimination on the grounds of nationality because of the clause.[341] In addition, it has been recognised that the TFEU and case law on Article 18 TFEU states that persons in a situation governed by EU law should be placed on equal footing with the nationals of the Member State.[342] However, the AG recognised that there may be a difference in treatment between nationals of different Member States where the Member State decides to withdraw from the benefit within the BITs specifically conferred on them. [343]

[338] Case C-284/16 *Slowakische Republik v Achmea BV* [2018] (f*ormerly Achmea v The Slovak Republic* which was formely *Eureko B.V. v The Slovak Republic*) para 3.
[339] Ibid para 82.
[340] Ibid para 60.
[341] Ibid para 38.
[342] Case 186/87 *Ian William Cowan v Trésor public* [1989] Judgment of 2 February 1989 para 10. Emphasis added. See also, to that effect, judgment of 6 September 2016, Case C-182/15 *Petruhhin v Latvijas Republikas Ģenerālprokuratūra* [2016] paragraphs 29 to 33, where Mr Petruhhin's situation was compared with that of a national of his host Member State.
[343] Case C-284/16 Slowakische Republik v Achmea BV (19 September 2017) para 63.

Secondly, the AG considered that the arbitral tribunal under Article 267 TFEU was a court or tribunal common to two Member States (the Netherlands and Slovakia) and a part of the permanent arbitration system. Therefore, it was permitted to request the court to give a preliminary ruling on questions on EU law. According to the Court, The arbitral tribunal is bound by the provisions within the Netherlands-Slovakia BIT in that it has compulsory jurisdiction to determine disputes in relation to *inter partes*[344] proceedings and its decisions should be independent and impartial based on the rule of law. Furthermore, the arbitration system is compatible with Article 267 TFEU as it does not fall outside the scope of the preliminary ruling mechanism. This means that there was no issue of compatibility with Article 344 TFEU.

Lastly, the AG made it clear that the requirement of Article 344 TFEU only applies to disputes between the Member States or the Member States and the EU.[345] However, it does not apply to disputes between individuals. Therefore, a dispute between a Member State and an investor did not fall within the scope of Article 344 TFEU. The provision requires the Member States to 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. Nevertheless, the AG noted that while '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 notably enshrined in Article 344 TFEU, according to which the Member States undertake not to submit a dispute concerning the

[344] Between the parties. Judgment of 31 January 2013, Belov (C-394/11, EU:C:2013:48, paragraph 38 and the case-law cited). See also, to that effect, judgments of 12 June 2014, Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta (C-377/13, EU:C:2014:1754, paragraph 23) and of 6 October 2015, Consorci Sanitari del Maresme (C-203/14, EU:C:2015:664, paragraph 17).
[345] See Opinion 2/13 (Accession of the Union to the ECHR), of 18 December 2014 (EU:C:2014:2454, paragraphs 202 and 205).

interpretation or application of the Treaties to any method of settlement other than those provided for therein'.[346] The AG rejected the argument that EU law offers investors in particular through fundamental freedoms and the Charter of Fundamental Rights of the EU ('the Charter'), full protection in the field of investments. It was argued that the meaning of 'full protection' was unclear. Despite this, it was stated that the scope of BITs is wider than that of EU and FEU Treaties and the guarantees of the protection of investments introduced by that agreement are different from those afforded in EU law, without being incompatible with EU law.[347] As a result, the opportunity afforded under Article 8 Netherlands-Slovakia BIT to have recourse to international arbitration did not undermine either the allocation of powers fixed by the EU and FEU Treaties or the autonomy of the EU legal system, even if the Court should decide that the arbitral tribunals constituted in accordance with that article are not courts or tribunals of the Member States within the meaning of Article 267 TFEU.

Although the opinion of the AG is not binding on the CJEU, its role is to provide a legal solution to the issue at hand. However, the CJEU tend to follow the opinion of the AG.

5.3. Key decisions mapped

In March 2018, the CJEU delivered its first judgment in the case of *Achmea*[348] in relation to the incompatibility of arbitration clauses within intra-EU BITs and EU law. The CJEU ruled that the arbitration provisions in Article 8 Netherlands-Slovakia BIT are invalid as they are incompatible with EU law due to the effect posed on the autonomy of EU law. The CJEU decided not to follow the opinion of AG Wathelet in

[346] Opinion 2/13 (Accession of the Union to the ECHR), of 18 December 2014 (EU:C:2014:2454, paragraph 201). See also, to that effect, Opinion 1/91 (EEA Agreement — I), of 14 December 1991 (EU:C:1991:490, paragraph 35), and judgments of 30 May 2006, Commission v Ireland (C-459/03, EU:C:2006:345, paragraph 123) and of 3 September 2008, Kadi and Al Barakaat International Foundation v Council and Commission (C-402/05 P and C-415/05 P, EU:C:2008:461, paragraph 282).
[347] Case C-284/16 Slowakische Republik v Achmea BV (September 19, 2017) para 228.
[348] Case C-284/16 Slowakische Republik v Achmea BV (March 6, 2018).

September 2017 and the decision by the German court which both stated that the arbitration clause within the BIT was not incompatible with EU law. The CJEU expressed that the arbitration clause removes disputes involving the interpretation or application of EU law from the mechanism of judicial review provided for by the EU legal framework.[349] In addition, the arbitration was said to have an adverse effect on the autonomy of EU law, enshrined particularly in Article 344 TFEU.[350] The CJEU focused on EU law by stating that it is characterised by the fact that it stems from an independent source of law, the treaties and by its primacy over the laws of the Member States.[351] As a result, these 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'.[352] This means that Member States have to ensure that the application of EU law is consistent among States. The CJEU made it clear that the judicial system is the keystone in ensuring consistency and uniformity in the interpretation of EU law which is the preliminary ruling procedure provided for in Article 267 TFEU.[353]

5.4 Problems with jurisdiction and intra-EU BITs as seen through the Achmea lens

Prior to the decision of *Achmea,* the compatibility of intra-EU investment arbitration with EU law had been highly contested for over a decade. In 2007, the arbitral tribunal rejected the notion that the application was limited and had been governed by EU law

[349] Clément Fouchard and Marc Krestin, The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky!' Kluwer Arbitration Blog 7 March 2018 http://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/ accessed 29 March 2018.
[350] Case C-284/16 Slowakische Republik v Achmea BV (March 6, 2018) para 59.
[351] Ibid 33.
[352] Ibid.
[353] Ibid 37.

since the Czech Republic acceded to the EU.[354] However, the issue of intra-EU BITs resurfaced where the CETA between the EU and Canada and the potential creation of a European multilateral investment court.[355]

However, the long-awaited decision by the CJEU in *Achmea* is criticised among academics in that it raises more questions than answers. The decision in *Achmea* is likely to raise doubt on the applicability to claims raised under the ECT (to which the EU is a contracting party) and to cases brought under the ICSID Convention and the impact on the position of the 196 intra-EU BITs currently in force.

Although the judgment in *Achmea* is not binding upon the investment treaty tribunal, the CJEU's ruling is likely to have an impact on future investor-state disputes and have far reaching consequences for current intra-EU BITs.[356] As a result, arbitral tribunals may find it difficult in accepting jurisdiction or set aside awards on the basis of incompatibility with EU law.

It is anticipated that there may be an increase in challenges of non-ICSID awards involving intra-EU BITs by arbitral tribunals in the EU.[357] This will relate to ICSID

[354] SCC Case No. 088/2004 *Eastern Sugar B.V. v The Czech Republic.*
[355] European Commission, EU-Canada trade agreement enters into force (September 20, 2017), <http://ec.europa.eu/trade/policy/in-focus/ceta/index_en.htm> accessed 15 June 2018.
[356] Clément Fouchard and Marc Krestin, The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky!' Kluwer Arbitration Blog 7 March 2018 <http://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/> accessed 29 March 2018. See also Case C-109/20 Republic of Poland v PL Holdings Sàrl ECLI:EU:C:2021:875 where the CJEU ruled that EU Member States are prohibited from entering into ad hoc arbitration agreements with EU-based investors, where such agreements would replicate the content of an arbitration agreement in a BIT deemed incompatible with EU law following the *Achmea decision.* Shearman and Sterling, Republic of Poland v PL Holdings Sàrl 'CJEU further undermines intra-EU investment protections' <https://www.shearman.com/perspectives/2021/11/republic-of-poland-v-pl-holdings-sarl--cjeu-further-undermines-intra-eu-investment-protections> accessed 10 November 2021.
[357] Eyvana Maria Bengochea, 'The Invalidity of Intra-EU Bilateral Investment Treaties after Slovakia V. Achmea- A Landmark Judgement For Intra-EU Investment Treaty Arbitration' The American Review of International Arbitration, 22 March 2018 <http://aria.law.columbia.edu/the-invalidity-of-intra-eu-bilateral-investment-treaties-after-slovakia-v-achmea-a-landmark-judgement-for-intra-eu-investment-treaty-arbitration/> accessed 22 April 2018.

disputes before arbitral tribunals outside the EU or intra-EU BITs under the ECT.[358] The challenges are likely to be successful under intra-EU BITs by arbitral tribunals seated within the EU. However, the implications of ICSID disputes and non-ICSID disputes before arbitral tribunals outside the EU and under the ECT are unclear.[359] Following the decision of *Achmea*, arbitral tribunals will now need to relook at the correlation between EU law, pending BITs and future investment disputes.

In addition to arbitral tribunals, national courts will also have to consider the issue of annulment and enforcement whereby a party chooses to challenge the awards or disagree with enforcement within the EU. Furthermore, the judgment in *Achmea* only refers to investor-state arbitration which relates to intra-EU BITs. However, it does not deal with the substantive protections under intra-EU BITs nor prevent the issue of resolving intra-EU investor-State disputes in domestic courts.[360] Investors may suffer in that they may feel frustrated by legal uncertainty where arbitration proceedings are pending or where they have obtained favourable awards that are not yet enforced. Even so, it will be more difficult for investors to settle their disputes outside of national courts belonging to the host state when relying on intra-EU BITS. This is because investors may feel that they could face issues of unfair treatment by the State court system which was funded by the defendant who agreed to the BIT. In an attempt to avoid this, the investors may seek to escape from intra-EU BITs by structuring their

[358] Anna de Luca, The Intra EU-BITs in the Opinion of AG Wathelet between Light and Shadow Kluwer Arbitration Blog February 4, 2018 <http://arbitrationblog.kluwerarbitration.com/2018/02/04/intra-eu-BITs-opinion-ag-wathelet-light-shadow/> accessed 6 May 2018.
[359] Rupert Bellinghausen and Julia Grothaus, CJEU judgment in Slovak Republic v. Achmea BV: intra-EU BITs incompatible with EU law, Arbitration Links 13 March 2018 <https://www.arbitrationlinks.com/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea-bv-intra-eu-BITs-incompatible-with-eu-law> accessed 22 April 2018.
[360] Cleary Gottlieb, 'European Court of Justice: Investor-State Arbitration under Intra-EU Bilateral Investment treaties is incompatible with EU law' Cleary Gottlieb Steen & Hamilton LLP, March 9 2018 <https://www.clearygottlieb.com/news-and-insights/publication-listing/european-court-of-justice-investor-state-arbitration-under-intra-eu-bilateral-investment-treaties> accessed 30 April 2018.

investments in a different manner. Whilst this can be said, the Member States will need to consider whether or not to comply with the awards already rendered. Additionally, they will have to consider if they should terminate or renegotiate the terms within their intra-EU BITs.[361]

The uncertainty caused by the *Achmea* decision may give rise to European Commission to instigate their proposals for an investment court system as a solution to the problem.[362] Furthermore, the European Commission may devise a structure that deals with the remaining investment treaties. However, the European Commission may choose to initiate proceedings against the Member States that comply with awards against *Achmea* and pressurise the Member States to terminate their intra-EU BITs.

As several scholars have mentioned, the impact of the decision may reduce confidence in the EU for dealing with ITA and the selection of a seat for arbitration.[363] This could, however, make post-Brexit Britain more attractive.[364] Despite this, the question remains on the issue of party autonomy as to the role of the CJEU and its influence. The influence will depend on any proposed alternative mechanisms, whereby the UK could become more attractive for structuring investments and being a seat for BIT arbitration disputes against the EU Member States.[365]

[361] Rupert Bellinghausen and Julia Grothaus, 'CJEU judgment in Slovak Republic v. Achmea BV: intra-EU BITs incompatible with EU law', (Arbitration Links, 13 March 2018) <https://www.arbitrationlinks.com/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea-bv-intra-eu-BITs-incompatible-with-eu-law> accessed 22 April 2018.
[362] Ibid.
[363] Ibid.
[364] Ibid.
[365] Ibid.

The controversial decision of the CJEU is likely to have an impact on countries such as Serbia[366] and Albania[367] which are due to join the EU and have concluded BITs with the EU Member States.[368] Upon accession, any intra-EU BITs made after the date (of accession) will fall to arbitration in the event of disputes. However, the issue lies within BITs before the accession date as to whether EU law applies. By the recommendation of the CJEU, the arbitral tribunal will not need to consider EU law. This issue at hand is rather complex because if the dispute arose after the accession but the dispute was due to the accession, this means that it is unlikely that EU law would be relevant even if it was imposed on the State. Furthermore, this leaves uncertainty as to the position of intra-EU BITs in relation to accession. Despite this, most BITs more specifically intra-EU BITs contain sunset clauses which prolong the protection granted to investors after the termination of BITs. Once a BIT is terminated investors are usually entitled to an additional period of protection which ranges between ten to thirty years. Under Article 47(3) ECT, investors have a twenty year protection period following the withdrawal of a treaty. An example of sunset clauses is Romania's BITs with Germany, the UK, and France which are twenty years while Romania provides a fifteen year protection with Bulgaria, Finland, Netherlands and Luxembourg.

In the wake of the *Achmea* decision, the Netherlands announced in April 2018 that they seek to terminate its intra-EU BIT with Slovakia and the other Member States. This is the first Member State to make the decision since *Achmea.* However, given the

[366] Currently in negotiations.
[367] Waiting to commence negotiations.
[368] Neil Newing, Lucy Alexander and Leo Meredith, 'What Next for Intra-EU Investment Arbitration? Thoughts on the Achmea Decision' (Kluwer Arbitration Blog, 21 April 2018) <http://arbitrationblog.kluwerarbitration.com/2018/04/21/what-next-for-intra-eu-investment-arbitration-thoughts-on-the-achmea-decision/> accessed 22 April 2018.

number of investments that are structured using a Dutch corporate vehicle (mainly for tax reasons), investors who hold assets in Europe through such methods would have to reconsider whether their investments are still protected under any applicable BITs.[369]

The table in Appendix A demonstrates the number of intra-EU countries which terminated their intra-EU BITs. For example, it can be seen that Italy terminated most of their intra-EU BITs by 2013 and the Czech Republic by 2011. However, the termination of a BIT does not end the protection of existing investments since the so-called "sunset clause" contained in BIT provides continued protection for ten years longer. Therefore, in 2011 the Czech Republic removed the sunset clause and then terminated the modified BIT. By this, the termination immediately removes any protection, even for existing individuals.[370] However, Italy withdrew most of the BITs by 2013 after being prompted by the European Commission that intra-EU BITs were incompatible with European law. Whilst 196 intra-EU BITs are in force, a number of EU Member States have not chosen to terminate their agreements and these BITs remain in force.

5.5 Conclusion

While it seems that the *Achmea* judgment addressed the issue of incompatibility with EU law concerning investor-State arbitration by deeming intra-EU BITs void and unenforceable, a question remains unanswered. This is because the judgment did not address other procedural or substantive protections available to investors under intra-

[369] Jasmin Garrett and Ben Sanderson, 'The Dutch move to terminate intra-EU BITs following the Achmea decision' (DLA Piper, 10 May 2018) <https://www.dlapiper.com/en/europe/insights/publications/2018/05/the-dutch-move-to-terminate-intra-eu-BITs-following-the-achmea-decision/> accessed 15 June 2018.
[370] Nikos Lavranos, 'The end of intra-EU BITs is nearing' (*Thomson Reuters*, 13 May 2016) <http://arbitrationblog.practicallaw.com/the-end-of-intra-eu-BITs-is-nearing/> accessed 15 June 2018.

EU BITs. In effect, this means that an investor (if suffered as a result of an intra-EU BIT) would seek redress under the protections of the intra-EU BIT before a domestic forum that complies with the *Achmea* judgment. Furthermore, since 29 August 2020, all procedural and substantive protections are invalid. Consequently, investors are still permitted to bring an action before the domestic courts of EU States but cannot base their claim on a violation of the substantive protections of intra-EU BITs.[371] Instead, investors are expected to seek redress under the rules and principles of EU law or domestic law. On the whole, the termination of intra-EU BITs has removed investor rights such as fair and equitable treatment, the right to full protection and protection against unlawful expropriation, all of which are found in BITs. It is viewed that the existing protections for investors under EU law are not well established and do not provide the same level of protection as intra-EU BITs.[372] Although it is acknowledged by the EU Commission in the Termination Agreement, the issue of a higher level of protection for investors previously contained in BITs continues. In an attempt to resolve the conflict of jurisdiction regarding intra-EU BITs Chapter six will explore solutions and analyse structures such as the OHADA, the UPC and the WTO.

[371] Ben Sanderson, Dávid Kőhegyi, Michael Ostrove and Zsófia Deli 'The end of Intra-EU BITs. Now what? (Part 1)' (15 May 2020) <https://www.dlapiper.com/en/uk/insights/publications/2020/05/the-end-of-intra-eu-BITs/> accessed 13 February 2021.

[372] Dentons, 'Termination of intra-EU bilateral investment treaties: the UK – the last safe haven?' (9 November 2020) <https://www.dentons.com/en/insights/articles/2020/november/9/termination-of-intra-eu-bilateral-investment-treaties> accessed 13 February 2021.

Chapter 6: Solutions as recommended by case studies- the Organisation for the Harmonisation of Business Law in Africa, the Unified Patent Court and the World Trade Organisation

6.1 Introduction

This chapter will provide case studies of three establishments: the OHADA, the UPC and the WTO. The OHADA is a system primarily for African countries and this study aims to determine how it has been able to overcome challenges of jurisdiction within Africa. Similarly, how the UPC handles patent disputes across the EU in the shadow of International Law. Again, this will also be analysed to determine whether its activities can provide sufficient lessons on how to model a European Investment Court System. As the WTO is the world's most active international dispute body, this will be analysed as to how conflict among nations is resolved. The lessons from the operation of all three establishments and their relationship with international law would be key to the development of the proposed investment court system. Therefore, this chapter will discuss the structure, procedural process, jurisdiction and enforcement mechanism of each establishment.

6.2. OHADA: The Institutional structure

The OHADA is a unique judicial body which consists of the CCJA which deals with appeals from national courts of the OHADA Member States and has its own dispute resolution rules of arbitration. Under the CCJA, arbitration is used in contractual disputes where any of the contracting parties is domiciled or habitually resides in an OHADA Member State or where the contract is to be executed in an OHADA area. Any arbitral awards issued by OHADA have the same effect in all OHADA Member

States under the principle of *res judicata*.[373] The OHADA is an intergovernmental organisation for legal integration[374] which was founded by the Treaty signed in Port Louis (Mauritius) in 1993 to bring together seventeen African States[375] to promote investments by providing legal certainty among the Member States. It was created because of the economic crisis and the decline in Africa's investment level. However, a contributing factor to the fall in investment level related to the legal and judicial insecurity concerning investor distrust caused by the disparity of the rules governing economic operations.[376] This was due to the poor state of courts, insufficient judicial personnel, lack of stakeholders' training in business law, judicial delays, and professional ethics issues.[377] The Treaty aimed to address the problems by acknowledging the need for an African dispute resolution mechanism and creating a climate of trust conducive to investment[378] such as the Uniform Arbitration Act.[379] This Act was created to enhance transparency, promptness and efficiency of arbitral proceedings in the Member States.[380] The framework allowed for the Member States to have the option of choosing to arbitrate under the CCJA[381] or the Uniform Act on

[373] Latin term meaning "a matter judged" preventing a party from bringing a claim or defence which has already been litigated.
[374] Organisation for the Harmonisation of Business Law in Africa, 'History of OHADA' (OHADA) <https://www.ohada.org/en/history-of-ohada/> accessed 1 March 2021.
[375] Current OHADA Member States- Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Ivory Coast, Mali, Niger, Republic of the Congo, Senegal and Togo.
[376] Organisation for the Harmonisation of Business Law in Africa, 'History of OHADA' (OHADA) <https://www.ohada.org/en/history-of-ohada/> accessed 1 March 2021.
[377] Ibid.
[378] UNIDA, 'OHADA: 25 years of promoting the rule of economic law in Africa' (UNIDA, 2018) <https://www.ohada.com/actualite/4450/ohada-25-ans-de-promotion-de-letat-de-droit-economique-en-afrique.html?langue=en> accessed 1 April 2021. Thomson Reuters, 'Uniform Arbitration Act (UAA)' (Practical Law) < https://uk.practicallaw.thomsonreuters.com/w-017-3801?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&firstPage=true> accessed 15 April 2021.
[379] 1999. The Uniform Arbitration Act (UAA) is uniform law that many states have adopted to codify rules on judicial recognition and enforcement of arbitration agreements and awards and was originally enacted in 1955 by the Uniform Law Commission.
[380] The Arbitration Brief, 'Reforms to OHADA Arbitration Law' (International, 2 November 2018) < https://thearbitrationbrief.com/2018/11/02/reforms-to-ohada-arbitration-law/> accessed 1 March 2021.
[381] 1996.

the Law of Arbitration.[382] In 2017, the OHADA Council of Ministers adopted a Uniform Mediation Act and revised the rules relating to the CCJA Rules on Arbitration and the Uniform Act of Arbitration. These revisions were published in the OHADA Official Journal on 15 December 2017 and provided a new framework for alternative dispute resolutions in all seventeen OHADA States on 15 March 2018.[383] The purpose was to attract investors and encourage confidence in OHADA seated arbitrations and mediations with the aim to capitalise on the economic growth of the continent.[384]

Firstly, the Uniform Mediation Act relates to the mediation process where parties seek to resolve an issue with any of the Member States. Before this Act, there was no framework for mediation and parties were able to agree on selecting a third party to aid an amicable settlement. However, this Act provided certainty and efficiency, set principles including the requirement for independence and impartiality of mediators and gave guidance as to the incompatibility of an arbitrator or expert on the same dispute. It also provided rules on the exchange of information between the parties and the mediator and rules on the enforcement of the mediator's recommendation.[385] Therefore, it standardised the mediation process and established the privilege of confidentiality for mediators and mediation participants.[386] The Uniform Mediation Act applied to all arbitration proceedings after its commencement date of 15 March 2018, despite the date of signature of the applicable mediation clause where the seat is in

[382] 1999.
[383] Armand Terrien and Sidonie Commarmond, 'The New OHADA Arbitration and Mediation Framework : A Glass Half Full?' (Kluwer Arbitration Blog, 18 February 2018) < http://arbitrationblog.kluwerarbitration.com/2018/02/18/new-ohada-arbitration-mediation-framework-glass-half-full/> accessed 1 March 2021.
[384] Ibid.
[385] CMS, 'Africa- New arbitration and mediation regulations introduced in the 17 OHADA member states' (CMS, 19 June 2018) <https://www.cms-lawnow.com/ealerts/2018/06/africa-new-arbitration-and-mediation-regulations-introduced-in-the-17-ohada-member-states> accessed 1 March 2021.
[386] Uniform Law Commission, 'Mediation Act' (ULC) <https://www.uniformlaws.org/committees/community-home?CommunityKey=45565a5f-0c57-4bba-bbab-fc7de9a59110> accessed 10 July 2021.

an OHADA Treaty Member State. It incorporates the area of confidentiality, timely court validation settlements and the independence of the mediator. It goes on further to add that a mediator is not permitted to act as an expert or arbitrator in the same dispute without the parties' agreement. In reference to arbitrators and dispute resolution clauses, there is a disparity between jurisdiction and admissibility. This is because respondents are expected to attempt mediation prior to litigation. However, many respondents use this as a delay tactic even when it is clear that the parties will not reach a settlement through mediation and it would have been better treated as one of admissibility.[387] Nevertheless, the Uniform Mediation Act states that pre-litigation requirements must be met, and a court or tribunal will have to give them effect. Despite this, the Uniform Mediation Act gives scope for courts or tribunals to issue interim and provisional measures when directing the parties to comply with the pre-litigation requirements. [388]

Secondly, the revised CCJA Rules on Arbitration replaced the previous rules of 1996 and reflect the current trends in international arbitration. The CCJA operates as a supreme court within the OHADA region and arbitration which rules on decisions made by national courts on issues concerning the OHADA Uniform Acts and conducts commercial arbitration in tandem with the Arbitration Act. The CCJA rules are similar to the International Chamber of Commerce (ICC) Rules of Arbitration where parties may commence institutional arbitrations administered by the CCJA under the CCJA rules if at least one party is domiciled in an OHADA Member State or if the contract is wholly or partially enforced. However, the previous rules were criticised because the

[387] Armand Terrien and Sidonie Commarmond, 'The New OHADA Arbitration and Mediation Framework : A Glass Half Full?' (Kluwer Arbitration Blog, 18 February 2018) < http://arbitrationblog.kluwerarbitration.com/2018/02/18/new-ohada-arbitration-mediation-framework-glass-half-full/> accessed 1 March 2021.
[388] Ibid.

same members were able to make decisions and hear applications to set aside those same proceedings. As a result, the revised CCJA Rules on Arbitration introduced safeguards such as a member of the court with the same nationality as a State involved in arbitration is not permitted to sit within the court panel and must be replaced by the CCJA president.[389] Also, in the interests of transparency, the court is permitted to disclose its reasons to all parties if one of the parties involved in the arbitration requests before the decision is made.[390] The revisions also clarified the position of the Court appointing arbitrators,[391] it provides reinforcement of the arbitrator's power[392] and the CCJA has been given broader powers in terms of scrutiny of draft awards.[393] The powers are now similar to that of the ICC Rules of Arbitration. The Court can suggest formal changes and draw the tribunal's attention to unaddressed claims, references that do not appear in the draft award, and the lack of reasons or apparent contradiction in the reasoning but are not permitted to propose a line of reasoning or substantive solution to the dispute.[394]

These revised CCJA rules allow the CCJA to administer arbitrations concerning investment instruments, investment codes, or a bilateral/multilateral investment treaty.[395] The procedure for appointing arbitrators has been further clarified within the revised CCJA Rules where the Secretariat General provides each party with an identical list of at least three arbitrator names given by the Court. From this, each party sends back their list stating their preferred choice in numerical order and striking out any names which they reject. Once the deadline has passed the Secretariat General

[389] Article 1.1.
[390] Ibid.
[391] Article 3.
[392] Article 19.
[393] Article 23.2.
[394] Ibid.
[395] Article 2.1.

will appoint the arbitrator or arbitrators by preference according to the list. However, if an arbitrator or arbitrators have not been appointed, the revised CCJA Rules grant the court discretionary power to appoint one or more arbitrators.[396] The draft awards must now be reasoned, and the consent of the parties is no longer required to waive this requirement.[397] If the circumstance arose where a failure to provide reasons for the award occurred, it would qualify as a ground for setting the award aside[398] as well as an improperly constituted tribunal or improperly appointed sole arbitrator.[399] In regards to setting awards aside, the CCJA should issue its decision to do so within six months of receiving the referral.[400] Decisions on exequatur[401] are issued by the CCJA President (or a judge with specifically delegated authority) no more than fifteen days after the request has been filed[402] according to the Uniform Act. However, for awards on interim or conservatory measures, the time frame is three days.[403] Furthermore, the grounds for setting aside awards are the same as the Uniform Act which avoids conflicts between the review of awards issued under CCJA rules and the scope of the Uniform Act but not under CCJA rules.[404] In addition, the CCJA President's decision to grant exequatur[405] can no longer be appealed on any basis.[406]

[396] Article 3.3.
[397] Article 22.1.
[398] Article 29.2.
[399] Ibid.
[400] Article 29.4.
[401] This is a legal document issued by the government permitting the enforcement fo a right within a specific jurisdiction.
[402] Article 30.2.
[403] Ibid.
[404] Laurence Franc-Menget and Merlin Papadhopulli, 'OHADA Arbitration Reform- Publication of the new Uniform Act on Arbitration and the Revised CCJA Arbitration Rules (Herbert Smith Free, 22 December 2017) < https://hsfnotes.com/arbitration/2017/12/22/ohada-arbitration-reform-publication-of-the-new-uniform-act-on-arbitration-and-the-revised-ccja-arbitration-rules/#more-9152> accessed 10 July 2021.
[405] Exequatur procedures allows a judicial decision made to be enforceable in a State abroad.
[406] Article 30.4.

Lastly, the Uniform Act on Arbitration replaced the previous version in 1999, which applies to all OHADA Member States and clarified the scope of the competence-competence principle where if no reference has been made to the arbitral tribunal or no request for arbitration has been submitted, national courts must now decline jurisdiction unless the arbitration agreement is not only manifestly invalid (covered under the previous version in 1999) and under the revised Act, manifestly inapplicable. The court first seised will be given fifteen days to make a final ruling on its decision. If required, an appeal may be brought before the CCJA for final consideration.[407]

The revised Act allows for permitted parties to waive their rights when seeking to set aside an award except in the case of international public policy.[408] This can be viewed as a reform which has embraced the liberal philosophy prevailing from the enactment of the OHADA Treaty and the earlier Uniform Act.[409] For this reason, it is one of the rare examples where the parties are entitled to expressly waive their right to set aside subject to international public policy. Once an application to set aside is made, the competent court has three months to issue a decision and failing to do so allows for an appeal to be submitted to the CCJA within fifteen days.[410] Nonetheless, as the majority of disputes are between OHADA Member States and private parties, the revised Act has sought to address this. According to Article 2 of the Act, States, local government, public establishment, and any legal entity governed by public law may also be parties to arbitration without the reliance on their national laws to contest the arbitrability of the dispute, their capacity to be parties to the arbitration or the validity

[407] Article 13.
[408] Article 25.
[409] Armand Terrien and Sidonie Commarmond, 'The New OHADA Arbitration and Mediation Framework : A Glass Half Full?' (Kluwer Arbitration Blog, 18 February 2018) < http://arbitrationblog.kluwerarbitration.com/2018/02/18/new-ohada-arbitration-mediation-framework-glass-half-full/> accessed 1 March 2021.
[410] Article 27.

of the arbitration agreement. Also, arbitration can be initiated by an arbitration agreement or an investment-related instrument, including an Investment Code or bilateral/multilateral investment Treaty.[411]

6.2.1 OHADA: Procedural Process

Under the OHADA arbitration framework, parties of the OHADA Member States conducting business with each other or with foreign investors have the option to arbitrate under two separate regimes: CCJA Rules and the Uniform Act. As explained in section 6.1, the CCJA Rules of Arbitration are similar to the ICC Rules of Arbitration. Parties may commence an institutional arbitration administered by the CCJA under the CCJA Rules if at least one party is domiciled in an OHADA Member State or if the contract is wholly or partially performed in the OHADA territory.

The Uniform Act on International Arbitration 1999 (Uniform Act) is directly applicable in all OHADA Member States whereby parties may commence an ad hoc arbitration or institutional arbitration administered by an institution other than the CCJA under the Uniform Act if the seat of the arbitration is located in an OHADA Member State.[412]

The selection and appointment of arbitrators are governed by Article 6 of the Uniform Act on Arbitration which states: Only a natural person may be an arbitrator. The arbitrator must have full capacity to exercise his civil rights and shall remain independent and impartial in relation to the parties. Each party is expected to appoint one arbitrator and the two arbitrators will select the third arbitrator. However, if a party fails to appoint an arbitrator within thirty days from receiving the request to do so or

[411] Article 3.
[412] Christian Dargham and Janice Feigher, 'OHADA arbitration at the crossroads' (Norton Rose Fulbright, September 2016) <https://www.nortonrosefulbright.com/en/knowledge/publications/9318d350/ohada-arbitration-at-the-crossroads> accessed 11 July 2021.

the two arbitrators do not agree on a third arbitrator within thirty days of being appointed, the appointment of an arbitrator shall be made upon request of a party by a competent judge in the State party. Also, in the case of a sole arbitrator, if the parties fail to appoint an arbitrator, the appointment of an arbitrator shall be made upon request of a party by a competent judge in the State party.[413] However, if the parties agree on an even number of arbitrators, the number of arbitrators shall be completed and a third arbitrator selected by the arbitration agreement or if lacking by a competent judge in the State party.[414]

6.2.2 Enforcement of OHADA decisions

To enforce an arbitral award under the Uniform Act, the award must be compatible with the requirements of the domestic jurisdiction where the enforcement is sought.[415] The 'competent state judge' must issue an order of exequatur and the order is binding and enforceable across OHADA Member States. It is important to note that the order of exequatur should be issued by the CCJA and not the State court. At present, there is no uniform exequatur regime across all OHADA Member States. This means that parties must apply for exequatur in each State where it wishes to enforce the award.[416]

6.3 The Unified Patent Court: An Overview

The UPC is an international court established by twenty-four EU Member States[417] (to which seventeen are currently bound) which addresses the issues of infringement and validity of Unitary and European patents under the Agreement on a UPC (UPC

[413] Article 5.
[414] Article 8.
[415] Al Tamimi and Co, 'The revised framework for OHADA Arbitration: a leap into the future?' < https://www.tamimi.com/law-update-articles/the-revised-framework-for-ohada-arbitration-a-leap-into-the-future/> accessed 1 March 2021.
[416] Norton Rose Fulbright, 'OHADA arbitration at the crossroads' < https://www.nortonrosefulbright.com/en/knowledge/publications/9318d350/ohada-arbitration-at-the-crossroads> accessed 1 March 2021.
[417] All EU member states except Spain, Poland and Croatia.

Agreement) of 19 February 2013. It is a single centralised court formed of first and second instances, with various locations [418] and is expected to commence full operation on 1 June 2023. The UPC Agreement is central to governing the UPC as it enables a single judgment in cross border disputes between private parties regarding patents granted under the current intergovernmental system. The UPC Agreement states it shall base its decisions on EU law (including the two EU regulations on the unitary patent), the UPC Agreement, the European Patent Convention, other international agreements applicable to patents and binding on all the participating Member States (such as The Agreement on Trade-Related Aspects of Intellectual Property Rights) and national law. This will apply to signatory countries that have ratified the UPC Agreement. The UPC's objectives are to establish an effective forum for enforcing and challenging patents in Europe, end the need for litigation in different countries, enhance legal certainty through harmonised case law in the area of patent infringement and validity, provide simpler, quicker and more efficient judicial procedures and harmonise substantive patent law relating to the scope and limitations of the rights conferred as well as the remedies in cases of infringement.[419] It aims to address the shortcomings of difficulties of costly parallel litigation and enhance legal certainty which will eliminate forum shopping between national courts and their procedures. Currently, national courts and authorities make decisions concerning the infringement and validity of European patents. In effect, this is problematic when a patent proprietor wishes to enforce a European patent in several countries or when a third party seeks the revocation of a European patent. Therefore, the UPC will provide a better framework for all parties bringing a claim for patents in Europe. It will offer

[418] Local divisions in Paris, Munich, Vienna, Brussels, Copehagen, Helsinki, Düsseldorf, Hamburg, Mannheim, Milan, Lisbon, Stockholm, Tallinn and Vilnius.

[419] European Patent Office, 'Unified Patent Court' < https://www.epo.org/applying/european/unitary/upc.html> accessed 2 May 2021.

better enforcement of valid patents, with Europe-wide effects of decisions, injunctions and damages and have effect in all participating countries. For third parties and the public, the UPC will provide a central revocation action, separate from the European Patent Office's (EPO) opposition procedure, at any time during the life of the patent.[420]

6.3.1 Unified Patent Court: Institutional Structure

The UPC will have a Court of First Instance which will be split into local, regional and central divisions. The local and regional divisions will have the authority to hear matters concerning infringement actions, with or without invalidity counterclaims. The panels of a regional or local division shall sit with three legally qualified judges; in certain scenarios, a technically qualified judge may be added. Whilst the central divisions will have the competence to hear invalidity actions, with or without an infringement counterclaim and the competence for actions for a declaration of non-infringement. The bench will consist of three judges: two legally and one technically qualified with qualifications and experience in the field of technology concerned.

Art 7(2) UPC Agreement provides that the central division is split into three seats which were intended to be located in Paris (main seat), London and Munich. Each seat will deal with cases depending on their assigned content. Paris will deal with cases relating to physics, electricity, transportation, textiles and paper, fixed constructions and performing operations patents, London will hear cases relating to chemistry, life sciences, metallurgy and human necessities and Munich will deal with patents on mechanical engineering, lighting, heating, blasting and weapons. However, due to Brexit, its withdrawal has meant that London will no longer hold a seat within the division. The seat will have to be relocated in the future but Paris is expected to deal

[420] Ibid.

with London's caseload for the interim period. The UPC has a Court of Appeal based in Luxembourg which is composed of five judges, namely three legally qualified judges from different Member States and two technically qualified judges with qualifications and experience in the field of technology. The UPC also has a central registry in Paris with sub-registries at each division that handle the administration of all proceedings.

6.3.2 Unified Patent Court: Procedural Process

The UPC substantive proceedings comprise three stages: written, interim and oral procedures. At First Instance an action is commenced where a statement of claim is filed or a statement of revocation (if appropriate). The statement must be detailed and contain the facts, evidence, argument and propositions of law relied upon. The claims and documents must be filed electronically at the registry of the UPC which is responsible for providing service on defendants. The defendant will then have three months to file its detailed defence (and counterclaim if necessary). Following this, there will be rounds of written pleading by both parties.

The next stage is the interim procedure where the judge-rapporteur makes directions to prepare for the oral hearing. The parties may be required to attend an interim conference to provide clarity on specific issues, submit additional evidence and consider the roles of experts or experiments. This procedure should be completed no later than three months after the written procedure. At any stage, the UPC may recommend the parties liaise with the Mediation and Arbitration Centre (or any other appropriate alternative dispute resolution service or process) to aid settlement. It is more likely to be proposed at this stage. The oral procedure will follow where the judge-rapporteur summons the parties to an oral hearing within two months after the interim procedure. Oral hearings mostly last one day but could be longer in certain cases. The oral hearing will consist of oral submissions from the parties and expert or witness

examination. After this, the written judgment should be delivered within six weeks of the oral hearing. Equally, the first instance proceedings should not last more than one year from its commencement.

Should the parties wish to appeal against the procedural and substantive decisions of the Court of First Instance, it must be brought within two months of the date of the notification of the decision. The appeal proceedings will consist of a written procedure, interim procedure and oral procedure, which is similar to the first instance proceedings but with shorter timescales.

6.3.3 Unified Patent Court: Jurisdiction

The UPC will have jurisdiction over all European patents designed for participating EU Member States which have ratified the UPC Agreement (Spain, Croatia and Poland are not participating, and neither is the UK, EU status aside, now it has withdrawn from the UPC) unless they have been opted out of the new court's jurisdiction, and also all unitary patents.[421] This means the UK courts will have exclusive jurisdiction over European patents designating the UK. Therefore, although there is a possibility of harmonisation for litigating patents across Europe with the UPC, at present European litigation remains somewhat fractured without unitary harmonisation.[422] However, the UPC will not have any competence to hear matters or rule on national patents. Whilst the UPC will have exclusive jurisdiction over unitary patents and European patents that have not been opted out of its jurisdiction, for a transitional period, national courts will continue to have jurisdiction over non-opted-out unitary patents along with the

[421] Herbert Smith Freehills, 'Navigating the new European Patent System' < https://www.herbertsmithfreehills.com/latest-thinking/hubs/upc> accessed 1 June 2021.
[422] D Young and Co, 'Guide to the Unified Patent Court' < https://www.dyoung.com/en/knowledgebank/faqs-and-guides/guide-unified-patent-court-upc> accessed 2 June 2021.

UPC. The UPC Agreement[423] provides a transitional period of seven years where actions can be brought before national courts and proprietors of patents may opt out from the exclusive competence of the UPC. However, there is scope for the transition period to be extended by up to another seven years but this will be assessed in the fifth year. It is possible for European patents to be opted out and opted back in during the transition period. Proprietors may wish to do so to avoid their patent being drawn into the UPC system by a revocation action and then opting back in when a UPC action seems more favourable for their purposes.[424] In summary, Article 83 UPC Agreement provides as follows: the opt only relates to traditional European patents as unitary patents will be subject to litigate in the UPC, any traditional European patent can be opted out if it has not previously been litigated before the UPC, all opt-outs will last the life of the European patent (unless withdrawn), there will be a three month sunrise period before the UPC becomes operational, patents that become a subject of UPC proceedings cannot be opted out and it is not possible to opt-out twice.

Only once the transitional period has ended, the UPC will have exclusive jurisdiction over non-opted-out European patents. Eventually, the UPC will have jurisdiction over all patents granted by the EPO in the unified patent Member States which will be no earlier than seven years after the UPC comes into force. Once the UPC is in effect, the only way to avoid the UPC will be to file separate applications at the national patent offices (separate FR, DE applications).[425]

6.3.4 Enforcement of the Unified Patent Court Decisions

[423] Article 83.

[424] Herbert Smith Freehills, 'UPC: Jurisdiction and "opt out"' < https://www.herbertsmithfreehills.com/latest-thinking/upc-jurisdiction-and-opt-out> accessed 1 June 2021.

[425] Mewburn Ellis, 'The Unitary Patent and the Unified Patent Court explained' < https://www.mewburn.com/law-practice-library/the-eu-unitary-patent-and-the-unified-patent-court-explained> accessed 11 June 2021.

The UPC was created to strengthen the existing European patent regime. Its system is designed to enforce its decisions across all EU Member States except for the opted-out States. The decisions of the UPC are binding and enforceable upon the contracting Member States. This means that enforcement shall take place in accordance with the enforcement procedures governed by the law of the particular Contracting Member State where enforcement takes place. If an enforceable decision or order of the Court is varied or revoked, the Court may order the party which has enforced such decision or order, upon the request of the party against whom the decision or order has been enforced, to provide appropriate compensation for any injury caused by the enforcement. Furthermore, if a party has failed to comply with the terms of the Court order, the First Instance panel may decide on penalty payments upon request of the other party or of its own motion.

6.4 The World Trade Organisation: Insight

The WTO was founded in 1995 to improve the welfare of people around the world and operates the global system of trade rules which assists developing countries in building their trade capacity.[426] Its founding principles are based on non-discrimination between its trading partners or its own, lowering trade barriers through negotiation to encourage trade, predictability through binding and transparency, promoting fair competition by discouraging unfair practices and providing support for less developed countries through encouraging development and economic reform.[427] The WTO was established as a result of the Marrakesh Agreement[428] which defined the scope,[429]

[426] WTO, 'Who we are' <https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm> accessed 11 June 2021.
[427] WTO, 'What we stand for' < https://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm> accessed 11 June 2021.
[428] This was an Multilateral Treaty signed in Morocco in 1994 by 123 nations.
[429] See Article 2, The Agreement Establishing the World Trade Organization 1994.

functions[430] and structure[431] of the WTO. In summary, the Marrakesh Agreement established the WTO as the main framework for trade relations on WTO Agreement matters, organised the WTO General Council to oversee WTO operations, provided for the decisions to be made by consensus and administered the WTO's dispute settlement process.

As a result of the implementation of the WTO, it replaced the 1948 General Agreement on Tariffs and Trade (GATT).[432] Besides, the creation of the WTO was brought about by several rounds of trade negotiations held under the GATT. The first trade rounds (1947-1960) focused on tariff reductions, Kennedy Round (1964-1967) included non-tariff issues such as anti-dumping, Tokyo Round (1973-1979) aimed at reducing both tariff and non-tariff barriers to international trade, Uruguay Round (1986-1994) extended the trading system to new areas such as trade in services and intellectual property and most importantly established the WTO as a new method for settling disputes. Furthermore, the Doha Round's (2001-present) objective was to lower trade barriers and increase global trade.

The WTO is the world's largest international body which facilitates the administration, implementation, and operation of multilateral trade agreements and negotiations including handling disputes.[433] As of 2021, the WTO has 164 member countries (which accounts for ninety-eight per cent of world trade), with Liberia and Afghanistan as the most recent members in 2016. It also has twenty-five observers (made up of countries and governments) which enable these organisations to follow discussions on matters

[430] See Article 3, The Agreement Establishing the World Trade Organization 1994.
[431] See Article 4, The Agreement Establishing the World Trade Organization 1994.
[432] The GATT was a Multilateral Treaty signed in 1947 by 23 countries and focused on minimising barriers to international trade by eliminating or reducing quotas or tarrifs which would boost the economy after the Second World War.
[433] Chatham House, 'World Trade Organization (WTO)' <https://www.chathamhouse.org/topics/world-trade-organization-wto> accessed 1 June 2021.

of direct interest to them.[434] Whilst the WTO is viewed as an alternative dispute mechanism which upholds the international rules of trade among nations, it attempts to mediate between nations to benefit the global economy.[435] The procedure for resolving trade conflicts is important for enforcing the rules and ensuring that trade runs smoothly.[436] Governments bring disputes to the WTO if they feel their rights under the WTO agreements have been infringed. Judgements by specially appointed independent experts are based on interpretations of the agreements and individual members' commitments. The system encourages members to settle their differences through consultation with each other. If this proves to be unsuccessful, they can follow a stage-by-stage procedure that includes the possibility of a ruling by a panel of experts and the chance to appeal the ruling on legal grounds.[437] The confidence in the WTO as a dispute resolution mechanism is evidenced by the number of cases brought to the WTO. As of 31 December 2021, 607 disputes have been brought to the WTO as opposed to 300 disputes during the GATT life span (1947-1994). The WTO's objective is to 'help trade flow smoothly, freely and predictably'.[438] This is achieved by administering trade agreements, acting as a forum for trade negotiations, settling trade disputes, reviewing national trade policies, building the trade capacity of developing economies and cooperating with other international organisations. Many WTO Members, including the EU, make active use of this system so that violations of trade

[434] World Trade Organization, 'International intergovernmental organizations granted observer status to WTO bodies' <https://www.wto.org/english/thewto_e/igo_obs_e.htm> accessed 11 July 2021.
[435] World Trade Organization, 'About WTO' <https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm> accessed 11 July 2021.
[436] Ibid
[437] Ibid.
[438] Ibid.

rules are corrected. However, the EU only initiates a dispute settlement case where other ways of finding a solution have not been productive.[439]

6.4.1 The World Trade Organisation: Structure

The WTO is based in Geneva, Switzerland and its top-level decision-making body is the Ministerial Conference which comprises representatives of all WTO members. They are required to meet at least every two years and can take decisions on all matters under any of the multilateral agreements. The Ministerial Conference have the ultimate power over all matters as set out in Article IV:1 of The Agreement Establishing the World Trade Organisation 1994 (Marrakesh Agreement).[440] Below the Ministerial Conference is the General Council which is formed of representatives from all member governments (normally ambassadors and heads of delegation based in Geneva) who meet every two years and have the authority to act on the behalf of the Ministerial Conference.

The General Council also acts as the Dispute Settlement Body (DSB) to deal with disputes between WTO members and have the authority to establish dispute settlement panels, refer matters to arbitration, adopt panel, Appellate Body and arbitration reports, maintain surveillance over the implementation of recommendations and rulings contained in such reports, and authorise the suspension of concessions in the event of non-compliance with those recommendations and rulings. The DSB usually meet once a month and upon a Member's request, the Director-General will arrange special meetings. Only the DSB can decide the outcome of a trade dispute following the recommendation of a Dispute Panel and a report from the Appellate Body

[439] European Commission, 'WTO dispute settlement' <https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/wto-dispute-settlement_en> accessed 14 July 2021.
[440] Para 1.2.2.1

of the WTO which may have amended the Panel recommendation if the party chose to appeal. When the DSB establishes panels it must approve the decision unless there is a consensus against it. This special decision procedure is known as ‘negative’ or ‘reverse’ consensus. This means one Member can always prevent the reverse consensus as it can avoid the blocking of a decision being taken.

In addition to the DSB, the General Council act as the Trade Policy Review Body to carry out trade policy reviews of Members and review the Director-General’s regular reports concerning trade policy development. The General Council delegates responsibility to four other bodies: Council for Trade in Goods, Council for Trade-Related Aspects of Intellectual Property Rights, Council for Trade in Services and Trade Negotiations Committee. The Council for Trade in Goods oversees the implementation and functioning of the GATT, multilateral understandings, agreements and decisions reached on trade and goods as a result of the Uruguay Round or carried over from earlier years. The Council for Trade-Related Aspects of Intellectual Property Rights oversees the most comprehensive Agreement on Trade-Related Aspects of Intellectual Property Rights. This is because it established the need for a link between intellectual property and trade. The Council for Trade in Services are responsible for facilitating the General Agreement on Trade in Services (GATS) and furthering its objectives. They oversee four subsidiary bodies: the Committee on Trade in Financial Services, the Committee on Specific Commitments, the Working Party on Domestic Regulation and the Working Party on GATS Rules. The Trade Negotiations Committee was set up as a result of the Doha Round to create subsidiary bodies to handle individual negotiating subjects. Also reporting to the General Council are the Committee on Trade and Environment, Trade and Development, Sub-Committee on Least-Developed Countries, Regional Trade Agreements, Balance of Payments

Restrictions, and the Committee on Budget, Finance and Administration. Each of the Plurilaterals (Information Technology, Trade in Civil Aircraft and Government Procurement) establishes its management bodies reporting to the General Council.

6.4.2 The World Trade Organisation: Process for dispute resolution

The Dispute Settlement Understanding (DSU) preferred method for a dispute to be resolved between the Members in accordance with Article 3.7 DSU.[441] Also, bilateral consultations are the first stage for formal dispute resolution[442] which give the parties the opportunity to resolve the matter without the need for litigation.[443] Once this has been explored and the parties have failed to reach a solution, the complaining party may request a panel within sixty days of the request for consultation. However, it is still possible for the parties to mutually agree on a solution later in the proceedings. A request for consultation must be made in writing and the reasons provided should include the legal basis for the complaint. The request formally initiates a WTO dispute and starts the application of the DSU. Unless otherwise agreed, the respondent has ten days to reply to the request and enter into consultations in good faith within thirty days of receiving the request. A failure to reply within the specified time will trigger the complainant to immediately proceed to the adjudicative stage of dispute settlement and request for a panel to be formed. However, if the respondent engages in consultation, the respondent may proceed to the adjudicative stage of dispute settlement only after sixty days if a solution has not been reached.

Once a solution has not been reached and the complainant has requested a panel to be formed to adjudicate the merits of the case, the request should be made in writing

[441] Understanding on Rules and Procedures Governing the Settlement of Disputes.
[442] Art 4, DSU.
[443] Art 4.5 DSU.

to the Chairman of the DSB. The complainant should file the request eleven days in advance. This is then passed to the entire WTO membership. The parties may select their chosen panellists and if they fail to agree, the WTO will appoint them. The panel may comprise three or five members depending on what the parties have agreed. Panellists may be selected from an indicative list of governmental and non-governmental individuals nominated by WTO Members, although other names can be considered as well. When a dispute is between a developing country Member and a developing country Member the panel must, upon request by the developing country Member, include at least one panellist from a developing country Member. The panel process is quite similar to a court hearing as both parties are required to submit written briefs and present oral hearings before the panel. Whilst the submissions are confidential, the panel report is shared with all Members and made public. Members may publish their submissions on their websites as soon as they are filled, after an oral hearing or once the process is concluded. Once the first written submissions have been exchanged, the panel holds a first oral hearing. This is held privately in Geneva and is similar to an oral hearing before a court but is more informal. During the first hearing, the parties are invited to present their views orally and may be asked to respond to questions from the panel to clarify all legal and factual issues. Upon conclusion of the first meeting, the parties are given a deadline of several days to submit written answers to the panel's questions.

Approximately four weeks later the parties are requested to exchange written rebuttals referred to as second submissions. The panel then holds a second meeting with the parties to hear the factual and legal arguments. The parties again respond to the questions raised by the panel and may be required to attend a third meeting if an expert is required.

After the oral hearings have been held, the panel examines the arguments from both sides to conclude the outcome of the dispute which includes their reasons in support. The panel then issue the parties a report which states the descriptive part and findings. The parties have two weeks to respond to the draft descriptive part.

Around two to four weeks after issuing the first draft, the panel issues the parties its report in an interim form containing its findings and conclusions as to whether the complainant's claim should be upheld or rejected. The parties may make comments and are entitled to request a meeting to discuss points raised in the interim report. If a party requests a review of specific information, this must be held within two weeks and the panel is permitted to hold an additional meeting with both parties. This is the last opportunity for the parties to rectify any factual mistakes. Once the panel have submitted its final report to the parties within two weeks after the conclusion of the interim report,[444] the final report is translated into other official WTO languages, circulated to all WTO Members and publically published. The report shall become the DSB's ruling or recommendation within sixty days unless a consensus rejects it. A party to the dispute has the right to appeal the panel's decision and the appellant should inform the DSB of its intention to appeal before the adoption of the panel report which is usually on the twentieth day after its circulation or within sixty days after circulation. The appeals are limited to legal questions and may only address the issues of law and legal interpretations. It does not address the issue of facts. Three of the seven Appellate body Members will assist in the appeal process. The appellant must file its written submission within ten days after the notice of appeal was filed. The appellee has twenty-five days from the notice of appeal to file their submissions. Within thirty to forty-five days after the notice of appeal, the Appellate Body holds a private

[444] The final report should be issued, as a general rule, within six months of the start of the proceedings.

oral hearing which is similar to the substantive meetings at the panel stage. However, there is only one hearing, oral statements are short, an oral hearing is limited to one day and parties may not ask each other questions. Once the oral hearing has ended, the division shares its views with the other four Appellate Body Members who were not assigned to the Appeal. Once this has taken place, the Appellate Body report is drafted, finalised, signed by the Appellate Body Members of the division and translated into the two other official languages of the WTO.

6.4.3 The World Trade Organisation: Enforcement

The WTO is based on consensus from its Members and this also applies to the enforcement of its decisions previously agreed in accordance with the DSU. Furthermore, the WTO itself holds no leverage over the Member nations and relies on its Members to enforce sanctions, retaliatory measures, and compensatory measures. Unlike some agencies, whose bureaucracies can threaten to withhold credit from an offending nation, WTO trade law is entirely consensus-based.[445] The role of the WTO is to hear disputes concerning the violation of trade agreements via its DSB.[446] As the Member nations would have previously agreed to dispute settlement, the enforcement of the decisions relies on the understanding of the parties that a multilateral approach is required under the agreed procedures that they negotiated.

A party that loses a case in the WTO is expected to follow the recommendations of the panel report (or the appellate report if the case has been appealed), and it must also state whether it intends to follow the panel's recommendations at a meeting of the DSB. If the party found in violation of a WTO agreement cannot immediately

[445] World Trade Organization, 'Whose WTO is it anyway?' <https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm> accessed 11 July 2021.
[446] Curtis, 'WTO Trade Disputes' <https://www.curtis.com/glossary/international-trade/wto-trade-disputes> accessed 29 June 2021.

comply with the panel's recommendations, it will be given a "reasonable period of time" to comply (usually no longer than fifteen months). If the losing party fails to comply with the panel's recommendations within the allotted time, it must enter into consultations with the winning party to seek an agreement on compensation. Compensation may be granted in a variety of ways (e.g. tariff reductions or the lifting of quotas on certain products). If an agreement on compensation cannot be reached within twenty days of the expiration of the allotted time, then the DSB can authorise the winning party to apply equivalent trade sanctions (e.g. increased tariffs) against the losing party.[447]

6.5 Conclusion

This chapter has presented a descriptive case study of three establishments which deal with international disputes and has laid the foundation for the recommendations which will be discussed in the next chapter. There are many lessons to be learnt which will feature in the proposed EU investment court as to the preferred method and demonstrates the strength of public law mechanisms as opposed to the private law system.

Chapter seven will examine the options as to how the EU investment court will be presented based on the case study in this chapter and suggest in what way the EU investment court will operate procedurally in addressing the conflict of jurisdiction.

[447] International Trade Administration, 'WTO Dispute Settlement Understanding' < https://www.trade.gov/trade-guide-wto-dsu> accessed 29 July 2021.

Chapter 7: Reform proposals

7.1 Introduction

This chapter will bring together all strands of the research undertaken within this thesis and propose recommendations for the way forward. In section 1.9 the following question was raised: To what extent can the current challenges on intra-EU BITs be resolved by an EU Investment court? To address the research question, the following steps were taken to ensure a conclusion was reached in light of the proposed EU Investment Court: a critical examination of the relationship between EU law and international law obligations within intra-EU BITs, the viability of a range of alternative solutions to intra-EU BITs enforcement within the EU assessed and an exploration of the OHADA, the UPC and the WTO to inform the reform direction towards an EU Investment Court.

This chapter will be broken down into two sections. Firstly, the future proposals in finding the way forward with the issues of conflict of jurisdiction. The aim is to consider the lessons learned from the OHADA, the UPC and the WTO and evaluate options on how the EU should move forward in light of the challenges posed by the conflict of jurisdiction situation. The limitations of this research will be highlighted. Lastly, a summary of the challenges and concluding remarks will be provided.

7.2 The way forward

This work has considered the many challenges faced by the conflict of jurisdiction issue which stems from its compatibility within the EU. From the research, the CJEU has rendered intra-EU BITs incompatible, and the focus has shifted to the domestic courts of the Member States to protect European investors' rights. Whilst the ECJ is concerned with European investment protection, the ruling in *Achmea* has raised a cause for concern over establishing jurisdiction or more importantly, the enforcement

of the BITs. Furthermore, it was suggested for a Multilateral Agreement as a way to resolve the issue which would terminate all intra-EU BITs and their sunset clauses. However, an Agreement is not the way forward in addressing the conflict of jurisdiction, especially where it lacks the power to compel those Member States which have not signed up to the Agreement. For this reason, it is proposed for the creation of an EU Investment court which will adopt the lessons learnt from the three establishments: the OHADA, the UPC and the WTO which will be highlighted in turn.

Firstly, the OHADA is a dispute resolution system which governs seventeen African nations and upholds the consensual nation of arbitration. OHADA promotes unity among its Member States and investors by creating a trusted and secure legal environment. Whilst a court system takes the view that litigation should be the last resort, the OHADA expect the parties to seek an amicable settlement which should be exhausted before engaging in the proceedings. The harmonisation of legal rules provides a clear framework for its investors where investors can rely on the OHADA arbitration procedure as a method to resolve disputes. Also, the OHADA created the CCJA which has exclusive jurisdiction to rule on disputes which relate to the application and interpretation of the Uniform Acts. The CCJA serves as the supreme court which ensures the common interpretation and application of OHADA laws. Whilst the OHADA has the ability to enforce an arbitral award which is binding, there is still room for improvement as the award must be compatible with the requirements of the domestic jurisdiction in which enforcement is sought. Additionally, the competent State judge must issue an order of exequatur. However, as mentioned in section 6.2.2, there is no uniform exequatur across all the OHADA Member States.

In summary, the OHADA provides the harmonisation of legal rules, consists of international standards of best practice concerning multi-party disputes and parallel

proceedings, addresses investor confidence through its provision of recourse of arbitration and is a court which has exclusive jurisdiction to rule on disputes concerning the application and interpretation of the Uniform Acts.

Secondly, the UPC is an international centralised forum created for EU Member States to deal with the infringement of European patents and Unitary patents. It will govern the twenty-four EU Member States which have signed the UPC Agreement. These Member States have agreed to transfer jurisdiction over European patents and Supplementary Protection Certificates from their national courts to a single centralised court.[448] Similar to the OHADA, the process of becoming a contracting Member State requires consent. The court consists of experienced Intellectual Property judges from all participating EU Member States and the structure follows a typical court system with a Court of First Instance and a Court of Appeal. The UPC allows for the ability to commence infringement proceedings in a single division that is convenient and suitable for the case to obtain a single pan-European injunction (preliminary or final) across several countries.[449] The decisions and orders of both courts (Court of First Instance and a Court of Appeal) are enforceable in any contracting Member State without the need for a declaration of enforceability from a national court and the enforcement procedures are governed by the law of the Contracting Member State where the enforcement takes place.[450] Any decision of the court shall be enforced under the same conditions as a decision in the Contracting Member State where the enforcement takes place and can be enforced as soon as it has been served to the

[448] Mewburn Ellis, 'The Unitary Patent and the Unified Patent Court explained' < https://www.mewburn.com/law-practice-library/the-eu-unitary-patent-and-the-unified-patent-court-explained> accessed 11 June 2021.
[449] Marks and Clerk, 'Q&A: Unitary Patent and Unified Patent Court' (21 January 2021) <https://www.marks-clerk.com/insights/articles/q-a-unitary-patent-and-unified-patent-court/> accessed 10 July 2021.
[450] Art 82, UPC Agreement.

defendant. If the defendant does not comply with an injunction or order, the UPC has the power to impose sanctions. It has even been suggested that proprietors can potentially shape early case law, and in particular may have an influence on a point of law that is currently unfavourable in national courts around Europe.[451]

Overall, the UPC displays many benefits such as its Pan-European enforcement such as the enforcement of European patents via a single infringement action, delivery of thorough decisions by a panel which includes experienced and specialist Intellectual Property judges, it is cost effective as a single infringement action can be brought (which will typically be more cost effective than bringing infringement actions in multiple national courts), the patents granted in English will be litigated in English which will reduce translation costs and it will be easier for patentees to demonstrate infringement of method claims where individual steps of the method have been performed in disparate Member States.[452]

Lastly, in support of Ehlermann's view in section 1.8, the WTO has been described as one of the most active international dispute settlement mechanisms in the world[453] which is based on a mutually agreed solution through adjudication. Since 1995, 615 disputes have been brought to the WTO and over 350 rulings have been issued.[454] Whilst the WTO is a forum for negotiating trade agreements, one of its functions is to resolve trade disputes. It allows Members the opportunity to enforce their rights against other WTO Members. The WTO applies to its 164 members who have joined

[451] Mewburn Ellis, 'The Unitary Patent and the Unified Patent Court explained' < https://www.mewburn.com/law-practice-library/the-eu-unitary-patent-and-the-unified-patent-court-explained> accessed 11 June 2021.
[452] D Young and Co, 'Pros and cons of the unitary patent and Unified Patent Court' <https://www.dyoung.com/en/knowledgebank/articles/up-upc-pros-cons> accessed 25 November 2021.
[453] WTO, 'Dispute settlement < https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.> accessed 11 June 2021.
[454] Ibid.

the system and agreed to be bound by its rules. Compared with other multilateral systems of dispute resolution in international law, the compulsory nature and the enforcement mechanism of the WTO dispute settlement system certainly stand out.[455] The WTO is based on consent from its Members and its decisions are binding. As a result, the WTO Members can enforce the decisions by way of sanctions, retaliatory measures, and compensatory measures under agreed procedures previously negotiated.

In essence, the WTO is a successful and effective dispute settlement system which settles disputes in a timely and structured manner, helps to prevent the detrimental effects of unresolved international trade conflicts and mitigates the imbalances between stronger and weaker players by having their disputes settled on the basis of rules rather than having the power to determine the outcome.[456] It also provides certainty for the concerned parties through the dispute settlement process.

7.3 The case for an EU Investment court

The conflict of jurisdiction has been a reoccurring theme throughout this thesis which has pinpointed the issues posed between intra-EU BITs and European law and suggests the need for reform. The current arbitral system has several drawbacks as follows: it is very limited or there is no right to appeal, there is a lack of consistency in standards, the standards are unclear, it involves open rules of evidence, there is no opportunity to correct erroneous arbitration decisions, parties waive their rights to access the court and have a judge decide the case, the arbitration awards are not

[455] WTO, 'Evaluation of the WTO dispute settlement system: results to date' < https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c12s3p1_e.htm> accessed 11 June 2021.

[456] WTO, 'Introduction to the WTO dispute settlement system' < https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s1p1_e.htm#:~:text=It%20helps%20to%20prevent%20the,having%20power%20determine%20the%20outcome.> accessed 11 June 2021.

directly enforceable and parties seeking to enforce must resort to judicial remedies, the procedure is held in private so there is no opportunity for arbitral tribunals to engage in law making through the creation of a body of quasi precedent and it focuses on the settlement of disputes rather than law creation. It is proposed that these drawbacks can be addressed by an EU Investment court which is consensually driven (like ICJ and International Criminal Court) where parties submit their sovereignty and follow the process of ratification to becoming a Member. This will also appeal to current parties already in an EU trade relationship that would lean towards such a system where they opt to be a part. The EU Investment court would have exclusive jurisdiction to hear matters of dispute resolution between EU signatories and will apply EU law in its entirety and respect its primacy over national law. By signing an Agreement, the EU Member State would have agreed to transfer all jurisdiction to the EU Investment court and all EU investment disputes will automatically fall under the jurisdiction of the court unless opted out.

Whilst it can be argued that there are weaknesses in a court system such as the lengthy process, lack of flexibility over the court process, general costs involved and the lack of technical knowledge. These can be overcome by the level of expertise involved in a hearing which may justify the lengthy process and the parties can be reassured that the dispute has been handled thoroughly. The court system is designed to be fair where parties do not have control over the process of the court or the procedure. Whilst the court process can be expensive and should be a last resort, cost effective options should be considered in further research. In relation to the lack of technical knowledge, the composition of the EU Investment court will mirror the UPC which requires legally qualified and technically qualified judges to sit on the panel. Despite the drawbacks of a court system, the Member States would have opted for

the EU Investment court and are fully aware of the advantages and disadvantages of a public law mechanism.

It is recognised that there are limitations to this thesis which does not fully explore the proposal such as providing an insight into the drafting of the Agreement on an EU Investment court, a detailed description of the court structure, the ratification process, the composition of the court, where the court will be located and the appointment procedure. However, it is suggested for the court system to include the best features of the three establishments explored within this thesis. Furthermore, this will provide a ground for future research in the development of the proposed EU Investment court which will also seek to address the drawbacks.

7.4 Summary and Concluding remarks

Although there has been an attempt to move towards EU mechanisms a Multilateral Agreement, it is not the way forward in handling such disputes. It raises the question of whether the EU Member States are obliged to conclude the Termination Agreement. The Termination Agreement does not resolve the end to intra-EU ISDS as tribunals will still be found to compete with the CJEU'S interpretative authority. Under EU law, the CJEU has no authority to compel Member States to conclude an international agreement outside the EU framework.[457] For this reason, the creation of an EU investment court is the way forward as it is best suited to handle the current conflict of jurisdictional problems within investment agreements such as the Termination Agreement. The reliance on an EU Investment court will resolve the issue of conflict between all EU Member States as opposed to private law mechanisms. It will also be

[457] This is notwithstanding the Stability and Growth Pact which mandates the stability of the Economic and Monetary Union within the EU but still lacks the power to compel EU Member States as demonstrated by repeated breaches by Member States.

more effective in enforcing its decisions as its decision is binding upon the Member States as opposed to the Termination Agreement which does not have the power to compel those Member States which have not signed. Equally, an EU Investment court will have the authority to impose sanctions on non-complying Member States. Therefore, as a public law mechanism, the EU investment court is best placed to resolve the issue of conflict by addressing the problem as opposed to private law which seeks to address the issue between the affected States.

Appendix A: Intra-EU BITs

No.	Parties	Date of signature	Status
1.	Austria - Bulgaria BIT (1997)	22/01/1997	In force
2.	Austria - Croatia BIT (1997)	19/02/1997	In force
3.	Austria – Czech Republic BIT (1990)	15/10/1990	In force
4.	Austria – Estonia BIT (1994)	16/05/1994	In force
5.	Austria – Hungary BIT (1988)	26/05/1988	In force
6.	Austria - Latvia BIT (1994)	17/11/1994	In force
7.	Austria - Lithuania BIT (1996)	28/06/1996	In force
8.	Austria - Malta BIT (2002)	29/05/2002	In force
9.	Austria – Poland BIT (1988)	24/11/1988	Terminated (unilaterally denounced) 16/10/2019
10.	Austria - Romania BIT (1996)	15/05/1996	In force
11.	Austria - Slovakia BIT (1990)	15/10/1990	In force
12.	Austria - Slovenia BIT (2001)	07/03/2001	In force
13.	BLEU (Belgium-Luxembourg Economic Union) - Bulgaria BIT (1988)	25/10/1988	In force
14.	BLEU (Belgium-Luxembourg Economic Union) - Croatia BIT (2001)	31/10/2001	In force
15.	BLEU (Belgium-Luxembourg Economic Union) - Cyprus BIT (1991)	26/02/1991	In force
16.	BLEU (Belgium-Luxembourg Economic Union) - Czech Republic BIT (1989)	24/04/1989	In force
17.	BLEU (Belgium-Luxembourg Economic Union) - Estonia BIT (1996)	24/01/1996	In force
18.	BLEU (Belgium-Luxembourg Economic Union) - Hungary BIT (1986)	14/05/1986	In force
19.	BLEU (Belgium-Luxembourg Economic Union) - Latvia BIT (1996)	27/03/1996	In force
20.	BLEU (Belgium-Luxembourg Economic Union) - Lithuania BIT (1997)	15/10/1997	In force
21.	BLEU (Belgium-Luxembourg Economic Union) - Malta BIT (1987)	05/03/1987	In force
22.	BLEU (Belgium-Luxembourg Economic Union) - Poland BIT (1987)	19/05/1987	In force
23.	BLEU (Belgium-Luxembourg Economic Union) - Romania BIT (1996)	04/03/1996	In force
24.	BLEU (Belgium-Luxembourg Economic Union) - Slovakia BIT (1989)	24/04/1989	In force
25.	BLEU (Belgium-Luxembourg Economic Union) - Slovenia BIT (1999)	01/02/1999	In force
26.	Bulgaria - Croatia BIT (1996)	25/06/1996	In force
27.	Bulgaria - Cyprus BIT (1987)	12/11/1987	In force
28.	Bulgaria - Czech Republic BIT (1999)	17/03/1999	In force

29.	Bulgaria - Denmark BIT (1993)	14/04/1993	In force
30.	Bulgaria - Finland BIT (1997)	03/10/1997	In force
31.	Bulgaria - France BIT (1989)	05/04/1989	In force
32.	Bulgaria - Germany BIT (1986)	12/04/1986	In force
33.	Bulgaria - Greece BIT (1993)	12/03/1993	In force
34.	Bulgaria - Hungary BIT (1994)	08/06/1994	In force
35.	Bulgaria- Italy BIT (1988)	05/12/1988	Terminated (unilaterally denounced) 09/05/2010
36.	Bulgaria - Latvia BIT (2003)	04/12/2003	In force
37.	Bulgaria - Lithuania BIT (2005)	21/11/2005	In force
38.	Bulgaria - Malta BIT (1984)	12/06/1984	In force
39.	Bulgaria - Netherlands BIT (1999)	06/10/1999	In force
40.	Bulgaria - Poland BIT (1994)	11/04/1994	In force
41.	Bulgaria - Portugal BIT (1993)	27/05/1993	In force
42.	Bulgaria - Romania BIT (1994)	01/06/1994	In force
43.	Bulgaria - Slovakia BIT (1994)	21/06/1994	In force
44.	Bulgaria – Slovenia BIT (1998)	30/06/1988	In force
45.	Bulgaria - Spain BIT (1995)	05/09/1995	In force
46.	Bulgaria - Sweden BIT (1994)	19/04/1994	In force
47.	Bulgaria - United Kingdom BIT (1995)	11/12/1995	In force
48.	Croatia - Czech Republic BIT (1996)	05/03/1996	In force
49.	Croatia - Denmark BIT (2000)	05/07/2000	In force
50.	Croatia - Finland BIT (1999)	01/06/1999	In force
51.	Croatia - France BIT (1996)	03/06/1996	In force
52.	Croatia - Germany BIT (1997)	21/03/1997	In force
53.	Croatia - Greece BIT (1996)	18/10/1996	In force
54.	Croatia - Hungary BIT (1996)	15/05/1996	In force
55.	Croatia - Italy BIT (1996)	05/11/1996	Terminated (expired) 12/06/2013
56.	Croatia - Latvia BIT (2002)	04/04/2002	In force
57.	Croatia - Lithuania BIT (2008)	15/04/2008	In force
58.	Croatia - Malta BIT (2001)	11/07/2001	In force
59.	Croatia - Netherlands BIT (1998)	28/04/1998	In force
60.	Croatia - Poland BIT (1995)	21/02/1995	Terminated (unilaterally denounced) 18/10/2019
61.	Croatia - Portugal BIT (1995)	09/05/1995	In force
62.	Croatia - Romania BIT (1994)	08/06/1994	In force
63.	Croatia - Slovakia BIT (1996)	12/02/1996	In force
64.	Croatia - Slovenia BIT (1997)	12/12/1997	In force
65.	Croatia - Spain BIT (1997)	21/07/1997	In force

66.	Croatia - Sweden BIT (2000)	23/11/2000	In force
67.	Croatia - United Kingdom BIT (1997)	11/03/1997	In force
68.	Cyprus - Czech Republic BIT (2001)	15/06/2001	In force
69.	Cyprus – Greece BIT (1992)	30/03/1992	In force
70.	Cyprus - Hungary BIT (1989)	24/05/1989	In force
71.	Cyprus – Malta BIT (2002)	09/09/2002	In force
72.	Cyprus - Poland BIT (1992)	04/06/1992	Terminated (unilaterally denounced) 17/01/2019
73.	Cyprus - Romania BIT (1991)	26/07/1991	In force
74.	Czech Republic - Estonia BIT (1994)	24/10/1994	Terminated (by consent) 20/02/2011
75.	Czech Republic - Denmark BIT (1991)	06/03/1991	Terminated (by consent) 18/11/2009
76.	Czech Republic – Finland BIT (1990)	06/11/1990	In force
77.	Czech Republic – France BIT (1990)	13/09/1990	In force
78.	Czech Republic- Germany BIT (1990)	02/10/1990	In force
79.	Czech Republic – Greece BIT (1991)	03/06/1991	In force
80.	Czech Republic – Hungary BIT (1993)	14/01/1993	In force
81.	Czech Republic - Ireland BIT (1996)	28/06/1996	Terminated (by consent) 01/12/2011
82.	Czech Republic - Italy BIT (1996)	22/01/1996	Terminated (by consent) 30/04/2009
83.	Czech Republic - Latvia BIT (1994)	25/10/1994	Terminated (by consent) 01/07/2019
84.	Czech Republic - Lithuania BIT (1994)	27/10/1994	In force
85.	Czech Republic - Malta BIT (2002)	09/04/2002	Terminated (by consent) 30/09/2010
86.	Czech Republic - Netherlands BIT (1991)	29/04/1991	In force
87.	Czech Republic - Poland BIT (1993)	16/07/1993	Terminated (by consent) 25/09/2019
88.	Czech Republic - Portugal BIT (1993)	12/11/1993	In force
89.	Czech Republic - Romania BIT (1993)	08/11/1993	In force
90.	Czech Republic - Spain BIT (1990)	12/12/1990	In force
91.	Czech Republic - Slovakia BIT (2002)	26/03/2002	Terminated (by consent) 01/05/2004

92.	Czech Republic - Slovenia BIT (1993)	04/05/1993	Terminated (by consent) 13/08/2010
93.	Czech Republic - Sweden BIT (1990)	13/11/1990	In force
94.	Czech Republic - United Kingdom BIT (1990)	10/07/1990	In force
95.	Denmark - Estonia BIT (1991)	06/11/1991	Terminated (by consent) 16/08/2017
96.	Denmark - Hungary BIT (1988)	02/05/1988	In force
97.	Denmark - Latvia BIT (1992)	30/03/1992	In force
98.	Denmark - Lithuania BIT (1992)	30/03/1992	In force
99.	Denmark - Poland BIT (1990)	01/05/1990	Terminated (by consent) 14/12/2019
100.	Denmark - Romania BIT (1994)	14/06/1994	Terminated (by consent) 19/08/2017
101.	Denmark – Slovakia BIT (1991)	06/03/1991	In force
102.	Denmark - Slovenia BIT (1999)	12/05/1999	In force
103.	Estonia - Finland BIT (1992)	13/02/1992	In force
104.	Estonia - France BIT (1992)	14/05/1992	In force
105.	Estonia - Germany BIT (1992)	12/11/1992	In force
106.	Estonia - Greece BIT (1997)	17/04/1997	In force
107.	Estonia - Italy BIT (1997)	20/03/1997	Terminated (by consent) 09/05/2009
108.	Estonia - Latvia BIT (1996)	07/02/1996	In force
109.	Estonia - Lithuania BIT (1995)	07/09/1995	In force
110.	Estonia - Netherlands BIT (1992)	27/10/1992	In force
111.	Estonia - Poland BIT (1993)	06/05/1993	Terminated (by consent) 07/03/2019
112.	Estonia - Spain BIT (1997)	11/11/1997	In force
113.	Estonia - Sweden BIT (1992)	31/03/1992	In force
114.	Estonia - United Kingdom BIT (1994)	12/05/1994	In force
115.	Finland - Hungary BIT (1988)	06/06/1988	In force
116.	Finland - Latvia BIT (1992)	05/03/1992	In force
117.	Finland - Lithuania BIT (1992)	12/06/1992	In force
118.	Finland - Poland BIT (1996)	25/11/1996	Terminated (unilaterally denounced) 16/10/2019
119.	Finland - Romania BIT (1992)	26/03/1992	In force
120.	Finland - Slovakia BIT (1990)	06/11/1990	In force

121.	Finland - Slovenia BIT (1998)	01/06/1998	In force
122.	France - Hungary BIT (1986)	06/11/1986	In force
123.	France - Latvia BIT (1992)	15/05/1992	In force
124.	France - Lithuania BIT (1992)	23/04/1992	In force
125.	France - Malta BIT (1976)	11/08/1976	In force
126.	France - Poland BIT (1989)	14/02/1989	Terminated (unilaterally denounced) 19/07/2019
127.	France - Romania BIT (1995)	21/03/1995	In force
128.	France - Slovakia BIT (1990)	13/09/1990	In force
129.	France - Slovenia BIT (1998)	11/02/1998	In force
130.	Germany - Greece BIT (1961)	27/03/1961	In force
131.	Germany - Hungary BIT (1986)	30/04/1986	In force
132.	Germany - Latvia BIT (1993)	20/04/1993	In force
133.	Germany - Lithuania BIT (1992)	28/02/1992	In force
134.	Germany - Malta BIT (1974)	17/09/1974	In force
135.	Germany - Portugal BIT (1980)	16/09/1980	In force
136.	Germany - Poland BIT (1989)	10/11/1989	Terminated (unilaterally denounced) 18/10/2019
137.	Germany - Romania BIT (1996)	25/06/1996	In force
138.	Germany - Slovakia BIT (1990)	02/10/1990	In force
139.	Germany - Slovenia BIT (1993)	28/10/1993	In force
140.	Greece - Hungary BIT (1989)	26/05/1989	In force
141.	Greece - Latvia BIT (1995)	20/07/1995	In force
142.	Greece - Lithuania BIT (1996)	19/07/1996	In force
143.	Greece - Poland BIT (1992)	14/10/1992	Terminated (unilaterally denounced) 16/10/2019
144.	Greece - Romania BIT (1997)	23/05/1997	In force
145.	Greece - Slovakia BIT (1991)	03/06/1991	In force
146.	Greece - Slovenia BIT (1997)	29/05/1997	In force
147.	Hungary - Italy BIT (1987)	17/02/1987	Terminated (by consent) 10/01/2008
148.	Hungary - Latvia BIT (1999)	10/06/1999	In force
149.	Hungary - Lithuania BIT (1999)	25/05/1999	In force
150.	Hungary - Netherlands BIT (1987)	02/09/1987	In force
151.	Hungary - Poland BIT (1992)	23/09/1992	In force
152.	Hungary - Portugal BIT (1992)	28/02/1992	In force
153.	Hungary - Romania BIT (1993)	16/09/1993	In force
154.	Hungary - Slovakia BIT (1993)	15/01/1993	In force

155.	Hungary - Slovenia BIT (1996)	15/10/1996	In force
156.	Hungary - Spain BIT (1989)	09/11/1989	In force
157.	Hungary - Sweden BIT (1987)	21/04/1987	In force
158.	Hungary - United Kingdom BIT (1987)	09/03/1987	In force
159.	Italy - Latvia BIT (1997)	21/05/1997	Terminated (by consent) 02/03/2009
160.	Italy - Lithuania BIT (1994)	01/12/1994	Terminated (expired) 14/04/2012
161.	Italy - Malta BIT (1967)	28/07/1967	In force
162.	Italy - Poland BIT (1989)	10/05/1989	Terminated (unilaterally denounced) 09/01/2013
163.	Italy - Romania BIT (1990)	06/12/1990	Terminated (by consent) 14/03/2010
164.	Italy - Slovakia BIT (1998)	30/07/1998	Terminated (by consent) 01/09/2012
165.	Italy - Slovenia BIT (2000)	08/03/2000	Terminated (by consent) 10/06/2009
166.	Latvia - Lithuania BIT (1996)	07/02/1996	In force
167.	Latvia - Netherlands BIT (1994)	14/03/1994	In force
168.	Latvia - Poland BIT (1993)	26/04/1993	Terminated (by consent) 19/01/2019
169.	Latvia - Portugal BIT (1995)	27/09/1995	In force
170.	Latvia - Romania BIT (2001)	27/11/2001	In force
171.	Latvia - Slovakia BIT (1998)	09/04/1998	In force
172.	Latvia - Spain BIT (1995)	26/10/1995	In force
173.	Latvia - Sweden BIT (1992)	10/03/1992	In force
174.	Latvia - United Kingdom BIT (1994)	24/01/1994	In force
175.	Lithuania - Netherlands BIT (1994)	26/01/1994	In force
176.	Lithuania - Poland BIT (1992)	28/09/1992	In force
177.	Lithuania - Portugal BIT (1998)	27/05/1998	In force
178.	Lithuania - Romania BIT (1994)	08/03/1994	In force
179.	Lithuania - Slovenia BIT (1998)	13/10/1998	In force
180.	Lithuania - Spain BIT (1994)	06/07/1994	In force
181.	Lithuania - Sweden BIT (1992)	17/03/1992	In force
182.	Lithuania - United Kingdom BIT (1993)	17/05/1993	In force
183.	Malta - Netherlands BIT (1984)	10/09/1984	In force
184.	Malta - Slovakia BIT (1999)	07/09/1999	In force

185.	Malta - Slovenia BIT (2001)	15/03/2001	In force
186.	Malta - Sweden BIT (1999)	24/08/1999	In force
187.	Malta - Turkey BIT (2003)	10/10/2003	In force
188.	Malta - United Kingdom BIT (1986)	04/10/1986	In force
189.	Netherlands - Poland BIT (1992)	07/09/1992	Terminated (unilaterally denounced) 02/02/2019
190.	Netherlands - Romania BIT (1994)	19/04/1994	In force
191.	Netherlands - Slovakia BIT (1991)	29/04/1991	In force
192.	Netherlands - Slovenia BIT (1996)	24/09/1996	In force
193.	Poland - Portugal BIT (1993)	11/03/1993	Terminated (unilaterally denounced) 03/10/2019
194.	Poland - Romania BIT (1994)	23/06/1994	Terminated (by consent) 21/05/2019
195.	Poland - Slovakia BIT (1994)	08/08/1994	In force
196.	Poland - Slovenia BIT (1996)	28/06/1996	Terminated (unilaterally denounced) 31/03/2020
197.	Poland - Spain BIT (1992)	30/07/1992	Terminated (unilaterally denounced) 16/10/2019
198.	Poland - Sweden BIT (1989)	13/10/1989	Terminated (unilaterally denounced) 16/10/2019
199.	Poland - United Kingdom BIT (1987)	08/12/1987	Terminated (unilaterally denounced) 22/11/2019
200.	Portugal - Romania BIT (1993)	17/11/1993	In force
201.	Portugal - Slovakia BIT (1995)	10/07/1995	In force
202.	Portugal - Slovenia BIT (1997)	14/05/1997	In force
203.	Romania - Slovakia BIT (1994)	03/03/1994	In force
204.	Romania - Slovenia BIT (1996)	24/01/1996	In force
205.	Romania - Spain BIT (1995)	25/01/1995	In force
206.	Romania - Sweden BIT (2002)	29/05/2002	In force
207.	Romania - United Kingdom BIT (1995)	13/07/1995	In force
208.	Slovakia - Slovenia BIT (1993)	28/07/1993	In force
209.	Slovakia - Spain BIT (1990)	12/12/1990	In force

210.	Slovakia - Sweden BIT (1990)	13/11/1990	In force
211.	Slovakia - United Kingdom BIT (1990)	10/07/1990	In force
212.	Slovenia - Spain BIT (1998)	15/07/1998	In force
213.	Slovenia - Sweden BIT (1999)	05/10/1999	In force
214.	Slovenia - United Kingdom BIT (1996)	03/07/1996	In force

Appendix A Data taken from UNCTAD'S website [458]

[458] Investment Policy Hub, 'European Union' <https://investmentpolicy.unctad.org/international-investment-agreements/groupings/28/eu-european-union-> accessed 10 October 2020. The statistics within this table is correct as of 10 October 2020. At the time of writing the United Kingdom has now formally left the EU but has been included for illustrative purposes and the transition period is in place until 31 December 2020.

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