



# ISDS in the EU: Achmea and beyond

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# The Achmea Ruling

- Issued on 6 March 2018
- CJEU concluded that the ISDS mechanism in the Netherlands and the Czech and Slovak Federative Republic BIT was incompatible with TFEU, as it had an adverse effect on the autonomy of EU law, as:
  - investment tribunals may interpret EU law, although they are not part of the EU judicial order
  - their awards are subject to review by the Courts of Member State
- Effect of Achmea on all intra-EU BITs
- Plurilateral Agreement which entered into force on 29 August 2020:
  - (i) it terminates all intra-EU BITs (including their sunset clauses);
  - (ii) it prohibits the initiation of new intra-EU ISDS cases and provides rules regarding the management of pending cases; and
  - (iii) it provides alternatives to the recourse – by investors – to intra-EU ISDS arbitration proceedings.

# Opinion 1/17

- CJEU examined the compatibility of the ISDS mechanism provided by the Comprehensive Economic and Trade Agreement between the EU and Canada (“CETA”)
- CETA is mixed international agreement (unlike a BIT)
- CJEU reached the outcome that the ISDS mechanism in CETA is compatible with EU Law
  - Notion of reciprocity
  - the tribunals established under CETA could only interpret and apply the provisions of CETA in accordance with international law,
  - national law as a matter of fact alone,
  - CETA tribunals’ examination of EU law would further “not be binding upon the courts or the authorities of the EU and Member States”.

# Where are we now?

- Extra- EU BITs?
  - Potentially problematic, depending on whether they might interpret EU law
- FTAs and international investments agreements?
  - Potentially problematic, depending on whether they might interpret EU law
- Still questions.....



# Where are we heading?

- The Commission is engaged in multilateral discussions to establish a multilateral investment court.



# And what about Brexit?

- The Trade and Cooperation Agreement entered into on 24 December 2020, inter alia, governs investment protection and dispute settlement.
- Part Six of the TCA, provides that any disputes under the agreement are subject to a “state-to-state” arbitration mechanism.
- TCA does not provide for any form of investor-state dispute settlement
- What about existing BIT?- Status questionable
- But, British courts will likely enforce awards under intra-EU BITs.