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TESI DI DOTTORATO

INTRA-EU INVESTMENT ARBITRATION AND THE PROLIFERATION OF INTERNATIONAL JURISDICTIONS IN THE CONTEXT OF THE DOCTRINE OF GLOBAL CONSTITUTIONALISM

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TABLE OF CONTENTS

INTRODUCTION

International investment law is one of the most dynamic and ever-expanding specialized sectors of international law, recognized for its inherent complexity.[1]

The law on foreign investment has "hybrid foundations" and finds its roots in the private as well as in the public sphere.[2] It involves interests of companies and individuals as well as prerogatives of sovereign entities. Further, not only it has given rise to a significant set of substantial rules for the protection of investments abroad, but it has also established a remarkable procedural tool to enforce such rules, arguably modelled on commercial arbitration.

Indeed, the Investor-State Dispute Settlement ('ISDS') system is a well-known alternative dispute resolution mechanism, established to resolve disputes between foreign investors and sovereign States over violations of investment protection standards. The ISDS system allows private parties to sue States in front of party-appointed arbitration panels, under arbitration clauses provided for in contracts, domestic laws, or – more often – treaties.

Investment law is currently one of the major topics of discussion in the international community. Scholars and practitioners have criticized certain aspects of this relatively recent and innovative area – which has been described as an "exotic" knowledge[3] – with particular regard to the potential threat that the ISDS system represents for the exercise of regulatory powers by public authorities and its perceived lack of legitimacy, as further elaborated in the thesis.

More in general, investment protection has become an autonomous branch of international law, often advancing positions that partly diverged from the predominant

[1] Investment law has been compared to the Australian platypus, an animal which is difficult to categorize due to its mixed-up appearance. ANTHEA ROBERTS, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107(1) *American Journal of International Law*, 2013, p. 45.

[2] ZACHARY DOUGLAS, *The Hybrid Foundations of Investment Treaty Arbitration*, 74(1) *British Yearbook of International Law*, 2003, p. 151.

[3] International Law Commission, Report of the Study Group on Fragmentation (finalized by Martti Koskenniemi), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, dated 13 April 2006, para. 8.

views of other international adjudicating bodies. Meanwhile, the myriads of arbitral tribunals involved in this field have struggled to provide a consistent legal framework for the decision of the ever-increasing investors' claims. Ultimately, the resolution of disputes in the investment domain opened the discussion over arbitration and its impact on issues of public interest.[4]

In this context, the European Commission raised major concerns over the possibility that the so-called intra-EU investment disputes – involving European citizens on the one side and EU Member States on the other – could be decided through the ISDS system. The main reasons were the overlap between investment protection standards and EU rules and the risk of depriving the Court of Justice of the European Union ('CJEU') from its exclusive jurisdiction over the interpretation and the application of EU law.[5]

For about a decade, arbitral tribunals consistently affirmed their jurisdiction to decide intra-EU investment disputes, arguing that EU law and investment arbitration could coexist without raising a conflict.[6] On 6 March 2018, the CJEU intervened in this one-sided debate and eventually concluded that the use of investment arbitration to resolve intra-EU investment disputes was not compatible with the principle of autonomy, a distinguishing feature of the "constitutional structure" of the EU legal order consistently referred to in the case law of the Court.[7] With the *Achmea* judgment, the CJEU seemingly put an end to the contention over the possible harmonization of intra-EU investment arbitration and the EU treaties.

However, after more than two years from this remarkable judgment, its implementation in practice has been much more troublesome than expected. Arbitral tribunals facing jurisdictional objections based on the *Achmea* judgment have repeatedly

[4] *See* VICTOR FERRERES COMELLA, *Arbitration, Democracy and The Rule Of Law: Some Reflections on Owen Fiss'S Theory*, Seminario en Latinoamérica de Teoría Constitucional y Política, 2014.

[5] European Commission, Internal Market and Services DG, Note to the Economic and Financial Committee, dated November 2006 as cited in *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, *SCC Case No. 088/2004*, Partial Award, dated 27 March 2007, para. 126.

[6] *Achmea B.V. v. The Slovak Republic (formerly Eureko B.V. v. The Slovak Republic)*, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, dated 26 October 2010.

[7] CJEU, Grand Chamber, Case C-284/16, *Slowakische Republik (Slovak Republic) v. Achmea BV*, Judgment, dated 6 March 2018.

found ways to distinguish their cases or patently refused to subordinate their decisions to the principles established by the CJEU.

Leaving aside the practical repercussions of this saga, the conflict between arbitral tribunals and the CJEU offers grounds to be analyzed through the lenses of two opposed tendencies that have characterized the study of international law in the last decades.

On the one hand, scholars adhering to the ideas of Global Constitutionalism have focused their attention on "the observation of enhanced constitutional quality beyond the nation/state" as a result of the shift in international relations prompted by globalization.[8] Against the backdrop of this scholarly discourse, the *Achmea* judgment could indicate the existence of constitutional features in the international realm, since it is strongly based on principles allegedly having a constitutional nature.

On the other hand, an ongoing academic discussion has stressed the "difficulties arising from the diversification and expansion" of international law, fueled by the proliferation of international jurisdictions and leading to the so-called fragmentation of the international legal order.[9] In this regard, arbitral tribunals refusing to apply the *Achmea* judgment could be regarded as an exemplification of the growing divergence between different self-contained regimes.

Significantly, the crucial role of adjudicating bodies stands out as a common element of these two approaches and constitutes an underlying aspect of the *Achmea* case as well as of the entire intra-EU investment arbitration saga.

With this in mind, the purpose of this thesis is to conduct an analysis of the *Achmea* judgment and its subsequent implementation from the perspective of the constitutionalization of the international legal order, taking into account the role played by the proliferation of international jurisdictions.

At the outset, the first chapter will provide a preliminary overview of the doctrine of Global Constitutionalism, introducing its relevant conceptual foundations, and will

[8] ANTJE WIENER ET AL., *Global Constitutionalism: Human rights, Democracy and the Rule of Law*, 1 (1) *Global Constitutionalism*, 2012, p. 8.

[9] International Law Commission, Report of the Study Group on Fragmentation (finalized by Martti Koskenniemi), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, dated 13 April 2006.

then specifically analyze a few selected scholarly reconstructions, with a view to assessing the relevance of international courts and tribunals. More precisely, the chapter will address theories that assume the existence of constitutional features in the international legal order, on the one hand, and theories that provide an analysis of prospective constitutional developments on the other, in an effort to understand the correlation between the existing plurality of jurisdictions in contemporary international law and Global Constitutionalism's theories.

The second chapter will focus on the interdependence between the rapid increase of international courts and tribunals and the fragmentation of the international legal order. It will begin by illustrating the fundamental features of the so-called international judicial function. The first section will provide an assessment of the scope of such function, drawing on the circumstances of the development of dispute settlement techniques in the international domain. This introductory analysis is the starting point for further reflections over the fragmentation of the international legal order. More precisely, the second section will carefully consider the reasons why scholars and practitioners have regarded the proliferation of international courts and tribunals as the primary factor triggering further divergence in the context of international law. The last section will outline some of the legal techniques that address the problems arising from fragmentation and will examine their practical impact.

Finally, the third chapter will present a general overview of investment arbitration, with a focus on the critical debate over the ISDS system. The first section will further elaborate on the nature of the investment law regime, suggesting the idea that it may constitute a paradigmatic example of fragmentation. The chapter will then discuss the issues arising in the specific context of intra-EU investment arbitration. The analysis will focus on the main arguments raised with respect to its incompatibility with EU law and the response of arbitral tribunals affirming their jurisdiction. The second section will also present the main findings of the CJEU in the *Achmea* case and offer a constitutional reading of the decision, with an overview of the stakeholders' initial reactions to it. The last section, which constitutes the core of this thesis, will provide a comprehensive

understanding of the *Achmea* judgment's impact.[10] More precisely, it will summarize the arguments adopted by arbitral tribunals with the effect of restricting the scope of the CJEU's decision, taking into account different categories of awards. The last section will also describe the domestic courts' developing approach to the issues raised by the *Achmea* judgment and the recent actions undertaken by the European Commission and the Member States, including the signature of the Agreement for the Termination of intra-EU Bilateral Investment Treaties of 5 May 2020.

In light of the above, the conclusions will explain the importance of the intra-EU investment arbitration saga from the perspective of its impact on constitutional developments beyond the State.

[10] In this regard, the third chapter draws on the reflections in a paper presented by the author at the seminar "Lo Stato di diritto – The Rule of Law" held in Milan on 4 July 2019. *See* FRANCESCO SORACE, *The Achmea Decision: Between Fragmentation and Constitutionalization*, in CHIARA AMALFITANO ET AL. (Eds.), *L'État de droit, Lo Stato di diritto, The Rule of law: Ateliers Doctoraux 2019*, Toulouse 2020, pp. 337 ff.

CHAPTER I

JUDICIAL FUNCTION AND GLOBAL CONSTITUTIONALISM

Summary: **1.** An Introduction to Global Constitutionalism's Theories **2.** Positive Analysis of International Organizations and their Constitutional Qualities **2.1.** The United Nations Charter as a Global Constitution: The Problem of Judicial Review **2.2.** The World Trade Organization and its Path to Constitutionalization: Remarks over the Appellate Body **2.3.** The European Union Constitutional Process: The Role of the Court of Justice of the European Union **3.** Normative Analysis of Potential Constitutional Developments **3.1.** Compensatory Constitutionalism: How to Preserve the Achievements of Constitutionalism **3.2.** Global Societal Constitutionalism: How to Enforce the Obligations of Multinational Enterprises **4.** Conclusion

1. An Introduction to Global Constitutionalism's Theories

The multifaceted debate over Global Constitutionalism has proliferated after the end of the Cold War and continues to be of broad and current interest,[11] despite the ongoing phase of return to unilateralism in the international arena and the progressive weakening of democracies around the world.[12] What makes this debate stimulating – and

[11] Without any claim to completeness, *see* the following monographs contributing to the development of Global Constitutionalism: RICHARD A. FALK, ROBERT C. JOHANSEN, SAMUEL S. KIM, *The Constitutional Foundations of World Peace*, Albany 1993; RONALD ST. JOHN MACDONALD AND DOUGLAS M. JOHNSTON, *Towards World Constitutionalism, Issues in the Legal Ordering of the World Community*, Leiden 2005; JEFFREY L. DUNOFF AND JOEL P. TRACHTMAN, *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge 2009; JAN KLABBERS, ANNE PETERS AND GEIR ULFSTEIN, *The Constitutionalization of International Law*, Oxford 2009; PETRA DOBNER AND MARTIN LOUGHLIN, *The Twilight of Constitutionalism?*, Oxford 2010; CHRISTINE E.J. SCHWÖBEL, *Global Constitutionalism in International Legal Perspective*, Leiden 2011; Associazione italiana dei costituzionalisti, *Costituzione e globalizzazione, Atti del XXVII Convegno annuale, Salerno 22-24 novembre 2012*, Napoli 2014; AOIFE O'DONOGHUE, *Constitutionalism in Global Constitutionalisation*, Cambridge 2014; ANTHONY F. LANG AND ANTJE WIENER, *Handbook on Global Constitutionalism*, Cheltenham 2017; AYDIN ATILGAN, *Global Constitutionalism: A Socio-legal Perspective*, Berlin 2017; MARTIN BELOV, *Global Constitutionalism and Its Challenges to Westphalian Constitutional Law*, Oxford 2018; TAKAO SUAMI, ANNE PETERS, MATTIAS KUMM, DIMITRI VANOVERBEKE, *Global Constitutionalism from European and East Asian Perspectives*, Cambridge 2018.

[12] JAMES CRAWFORD, *The Current Political Discourse Concerning International Law*, 81 (1) *The Modern Law Review*, 2018, p. 22. JEFFREY L. DUNOFF ET AL., *Hard Times: Progress Narratives, Historical Contingency and the Fate of Global Constitutionalism*, 4(1) *Global Constitutionalism*, 2015, p. 13 ("To note that the phenomena embedded in this journal's title are contingent, and that they appear to be in (a temporary) retreat, is decidedly not to suggest that scholarly analysis of these topics is unimportant.").

at the same time highly controversial – is the lack of an agreed conceptualization of Global Constitutionalism, which brought a distinguished scholar to maintain that there are "different strands" comprising this interdisciplinary school of thought.[13] Still, it is possible and advisable to identify a few starting points forming the common foundations of the various ramifications that constitute Global Constitutionalism.

Globalization has certainly been the key factor that allowed to discuss on a planetary scale themes that have traditionally been addressed only in the domestic sphere.[14] Regarded as a "long-term historical process that denotes the growing intensity of worldwide interconnectedness," globalization has shrunk the world through the development of transport, information and communication technologies that had a tremendous impact on the economic factors. Regardless of any boundary, it affected, as a result, politics, ideologies and cultures,[15]

There are numerous indicative examples of the far-reaching influence of this phenomenon on the law in general and international law in particular.[16]

For instance, globalization has given rise to new key players, such as multinational enterprises, complex organizations that operate at a transnational level, which revealed the significance of the private sector in a field that was once defined by its inherent public

[13] ANNE PETERS, *Global Constitutionalism*, in MICHAEL T. GIBBONS, *The Encyclopedia of Political Thought*, Malden 2014, p. 1. *See also* ANNE PETERS, *Constitutionalization*, in JEAN D'ASPREMONT AND SAHIB SINGH, *Concepts for International Law: Contributions to Disciplinary Thought*, Cheltenham 2019, pp. 141 ff.

[14] As a matter of fact, the discussion over the constitutional nature of the international legal order predates the Second World War and may find antecedents even among Enlightenment philosophers, including especially the works of Immanuel Kant. *See inter alia* JÜRGEN HABERMAS, *The Kantian Project and the Divided West – Does the Constitutionalization of International Law Still Have a Chance?*, in JÜRGEN HABERMAS, *The Divided West*, translated by Ciaran Cronin, Cambridge and Malden 2006. There are also numerous scholarly overviews of past legal regimes in light of the Global Constitutionalism debate. *See e.g.* JILL HARRIES, *Global Constitutionalism: the Ancient Worlds*, ANTHONY F. LANG AND ANTJE WIENER, *Handbook on Global Constitutionalism*, Cheltenham 2017. However, globalization has paved the way for a leap forward, highlighting the critical aspects of the traditional relationships of international law, as will be pointed out below.

[15] ANTHONY MCGREW, *Globalization and global politics*, in JOHN BAYLIS, STEVE SMITH, AND PATRICIA OWENS, *The Globalization of World Politics: An Introduction to International Relations*, Oxford 2016, p. 15; for an overview of the development of the notion of globalization *see* MICHAEL LANG, *Globalization and Its History*, 78 (4) *The Journal of Modern History*, 2006.

[16] There have been multiple attempts to analyze the impact of globalization on the law, *see* extensively JEAN-BERNARD AUBY, *La globalisation, le droit et l'État*, Paris 2010, pp. 4-24; JAAKO HUSA, *Advanced Introduction to Law and Globalisation*, Cheltenham 2018.

nature.[17] While the debate on the status of multinational enterprises in the framework of public international law is still ongoing, one cannot deny that their conducts have effects that may exceed those achieved by entire countries.[18] It follows that States – though obviously remaining at the center of international relations – are no longer alone on this stage.

Further, global problems linked to globalization often constitute transnational externalities. Hence, they cannot be worked out by individual States but need to be taken care of by means of global solutions.[19] As a consequence, the role of supranational institutions and other forms of association between States has been increasingly enhanced in the last few decades, especially when compared to the beginning of the last century.[20] States' commitment in this respect has been also implemented through sophisticated legal approaches transcending the traditional notion of sovereignty, such as *erga omnes* obligations.[21]

In order to undertake the challenging task to deal with the consequences resulting from this enlarged dimension, whole new branches of law have emerged. In the meantime, the circulation of goods has incidentally made it easier for ideas to spread. Hence, juridical notions and instruments have been continuously migrating between different legal systems, as plainly evidenced by the use of foreign and international law

[17] Notably, many other non-State actors have become increasingly relevant in international relations. For instance, non-governmental organizations (NGOs) have acquired a critical role in safeguarding human rights worldwide. *See* extensively STEVE CHARNOVITZ, *Nongovernmental Organizations and International Law*, 100 (2) *American Journal of International Law*, 2006, pp. 348 ff.

[18] *See e.g.*, JOSÉ E. ALVAREZ, *Are Corporations "Subjects" of International Law?*, 9 (1) *Santa Clara Journal of International Law*, 2011. *See also* the sociological approach to the problem illustrated by GUNTHER TEUBNER, *Constitutional Fragments: Societal Constitutionalism and Globalization*, Oxford 2010 and the analysis provided in § I.3.2.

[19] For instance, the protection of the environment is often considered an issue that cannot be solely addressed by individual States but requires the joint efforts of the international community. For an analysis of the influence of Global Constitutionalism on the achievement of environmental sustainability *see* LOUIS J. KOTZÉ, *Global Environmental Constitutionalism in the Anthropocene*, Oxford and Portland 2016. Another illuminating example is international trade governance, which is inextricably connected with globalization and requires a great deal of cooperation among States. *See also* § I.2.2.

[20] The European Union ('EU') provides the most celebrated example of the intensification of supranational bonds, as addressed in § I.2.3, which has given a fundamental contribution in assuring seventy years of peace in a continent that was devastated by the two World Wars.

[21] For a thorough overview of the implications of this concept *see* CHRISTIAN J. TAMS, *Enforcing Obligations* Erga Omnes *in International Law*, Cambridge 2005. *See also* § I.2.1.

within judicial reasonings.[22] Nonetheless, the development of these trends has not been necessarily followed by more centralization and uniformity and the expansion of legal activity has led to an increasing fragmentation of the international legal order.[23]

In a broader sense, it might be argued that globalization has exposed the limits of a system centered only on Nation-States. It displayed the inadequacy of classic international law's categories to respond to unprecedented challenges and the necessity to go beyond its long-established structures in a post-Westphalian scenario.

Having said that, as globalization seems to be permanent, it is necessary to understand how to withstand its impact and devise new governance systems more suitable for the contemporary times. Accordingly, the research focus of many scholars from various disciplines has been to figure out how to navigate this Babel-like world and to deal with the issues brought up by globalization.[24]

Against this background, Global Constitutionalism's scholars claim that constitutional law's categories represent a useful tool to analyze the changes that have already taken place in the globalized realm, together with prospective improvements.[25] The cornerstone of this doctrine – here intended as an academic framework to understand

[22] This phenomenon is accounted for by a empirical studies that show recent trends concerning the ideological evolution of constitutions. *See e.g.*, DAVID S. LAW AND MILA VERSTEEG, *The Evolution and Ideology of Global Constitutionalism*, 99 *California Law Review*, 2011, pp. 1166-1167; ORAN DOYLE, *Constitutional Cases, Foreign Law and Theoretical authority*, 5 (1) *Global Constitutionalism*, 2016, p. 85. *See also* the discussion on cross-fertilization between international adjudicating bodies in § II.3.2.

[23] *See* International Law Commission, Report of the Study Group on Fragmentation (finalized by Martti Koskenniemi), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, dated 13 April 2006. *See also* § II.2.1.

[24] *See e.g.*, NICO KRISCH, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford 2012 (criticizing the constitutional approach to post-national law and favoring the alternative model of legal pluralism.); SABINO CASSESE, *Research Handbook on Global Administrative Law*, Cheltenham 2016 (summarizing the evolution of the emerging field of global administrative law, which focuses on the use of administrative law mechanisms worldwide.); ANNE-MARIE SLAUGHTER, *A New World Order*, Princeton 2004 (providing a description of the world governance through "government networks" and referring to the "globalization paradox" which stresses the undesirability of a large gap between coercive authorities and those who are governed.). For a comprehensive assessment of the manifold trends in legal theory regarding 21st-century international law *see* EMMANUEL ROUCOUNAS, *A Landscape of Contemporary Theories of International Law*, Leiden and Boston 2019.

[25] ANNE PETERS, *Global Constitutionalism*, in MICHAEL T. GIBBONS, *The Encyclopedia of Political Thought*, Malden 2014, p. 1.

a legal order – is therefore to borrow benchmarks usually applied in the domestic context and adopt them to assess the adherence of the international legal sphere to constitutional arrangements and values.[26]

As a matter of course, there is no agreement on the definition of "constitutionalism," "constitutionalization" and "constitution" in the literature on Global Constitutionalism, leading to a certain "cacophony" in the debate.[27] Thus, just to name a few, constitutionalism has been defined as an "intersection of law and politics,"[28] a "form of governance based upon normative values,"[29] "a type – rather than a quantum – of rules,"[30] "not so much a social or political process, but rather an attitude, a frame of mind"[31] and a "special and particularly ambitious form of legalisation."[32] Given the variety of definitions, it is only natural that almost every author has its own ideas and

[26] ANNE PETERS, *The Merits of Global Constitutionalism*, 16 (2) *Indiana Journal of Global Legal Studies*, 2009, p. 397. *See also* ANNE PETERS AND KLAUS ARMINGEON, *Introduction: Global Constitutionalism from an Interdisciplinary Perspective*, 16(2) *Indiana Journal of Global Legal Studies*, 2009, p. 389 ("We employ the term 'global constitutionalism' in order to characterize an academic and political agenda which identifies and advocates the application of constitutionalist principles, such as the rule of law, checks and balances, human rights protection, and possibly democracy, in the international legal sphere in order to improve the effectiveness and the fairness of the international legal order.").

[27] The expression "constitutional cacophony" – used to describe the divergent definitions in this regard – was coined by CORMAC MAC AMHLAIGH, *Harmonising Global Constitutionalism*, 5 (2) *Global Constitutionalism*, 2016, p. 173.

[28] ANTHONY F. LANG AND ANTJE WIENER, *Handbook on Global Constitutionalism*, Cheltenham 2017, p. 2 (listing four principles characterizing the functions of a constitutional legal order: rule of law, balance or separation of powers, constituent power and rights).

[29] AOIFE O'DONOGHUE, *Constitutionalism in Global Constitutionalization*, Cambridge 2014, p. 14 (analyzing three norms of constitutionalism: rule of law, divisions of power and democratic legitimacy).

[30] JEFFREY L. DUNOFF AND JOEL P. TRACHTMAN, *A Functional Approach to International Constitutionalization*, in JEFFREY L. DUNOFF AND JOEL P. TRACHTMAN, *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge 2009, pp. 9-10 (specifying no less than seven mechanisms associated with constitutionalization: horizontal allocation of authority, vertical allocation of authority, supremacy, stability, fundamental rights, review and accountability or democracy).

[31] JAN KLABBERS, *Setting the Scene*, in JAN KLABBERS, ANNE PETERS AND GEIR ULFSTEIN, *The Constitutionalization of International Law*, Oxford 2009 (further clarifying that constitutionalism "is the philosophy of striving towards some form of political legitimacy, typified by the respect for, well, a constitution.").

[32] DIETER GRIMM, *The Achievement of Constitutionalism*, in PETRA DOBNER AND MARTIN LOUGHLIN, *The Twilight of Constitutionalism?*, Oxford 2010, pp. 9-10 (identifying two elements of constitutionalism: the democratic element and the rule of law element.).

perceptions as to the meaning and implications of Global Constitutionalism. Indeed, such vagueness and heterogeneity has drawn considerable criticism from several scholars.[33]

In this context, as pointed out by a number of authors,[34] a common ancestor – or perhaps a plausible touchstone of the several theories advanced – can be found in the 1789 Declaration of the Rights of Man and of the Citizen, issued by France's National Constituent Assembly during the French Revolution, which embodies the values of the Enlightenment era. This over two-hundred years old document already established that:

> Any society in which the guarantee of rights is not ensured, nor the separation of powers is determined, has no constitution at all.[35]

Notwithstanding the underlying complexity and all the possible additions to the notion of constitutionalism, it appears that these two factors – the guarantee of rights and the separation of powers – have stood the test of time and might constitute a compass for assessing the governance of any given legal order,[36] irrespective of the existence of a constitution in a formal sense.[37] The point is that any claim with regard to the

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[33] *See e.g.,* CARLO FOCARELLI, *Costituzionalismo internazionale e costituzionalizzazione della global governance: alla ricerca del diritto globale*, 2 *Politica del Diritto*, 2011 (stating that the scholarly debate on international constitutionalism has conveniently relied on the term "constitution" without clarifying the meaning of such term); ROSSANA DEPLANO, *Fragmentation and Constitutionalisation of International Law: A Theoretical Inquiry*, 6(1) *European Journal of Legal Studies*, 2013 (underlining "a lack of terminological and theoretical consensus among scholars, which ultimately undermines the ultimate purpose of such conceptions.").

[34] THOMAS GIEGERICH, *The Is and Ought of International Constitutionalism: How Far Have We Come on Habermas's Road to a Well-Considered Constitutionalization of International Law*, 10 *German Law Journal*, 2009, p. 45 ("If the essential rationale of a constitution is to constrain government which was instituted in the first place to secure the natural and inalienable rights of humankind, but due to its great power, now becomes a potential threat to these very rights, then the protection of human rights (including the right to political participation) and the separation of powers can indeed be identified as essential ingredients of any constitution in the proper sense. In other words legitimacy and control of a government are the essence of constitutionalism."); TAKAO SUAMI, ANNE PETERS, MATTIAS KUMM, DIMITRI VANOVERBEKE, *Global Constitutionalism from European and East Asian Perspectives*, Cambridge 2018, p. 6 (referring to the historical "roots" of Global Constitutionalism); BARDO FASSBENDER, *The United Nations Charter as the Constitution of the International Community*, Leiden 2009, p. 25.

[35] Article XVI, *Déclaration des droits de l'homme et du citoyen de 1789*, dated 26 August 1789 (translated by the author).

[36] For an overview of the universal scope of application of Article XVI of the1789 Declaration of the Rights of Man and of the Citizen *see* QUIRINO CAMERLENGO, *Contributo ad una teoria del diritto costituzionale cosmopolitico*, Milano 2007 pp. 97-111.

[37] While one of the objectives of constitutionalism was the adoption of a written constitution, the same substantial values can be assured in practice even in the absence of a formal document. *See*

constitutional qualities of a given system should at least be accompanied by an analysis of these two factors that lie at the core of modern constitutionalism.

Whatever definition is chosen, however, the objective of Global Constitutionalism can be described as the study of constitutional interactions on a global scale.

In doing so, it is possible to focus on a certain area of international law, a supranational organization in particular, or an emerging paradigm shift in international relations, as will be seen below. It may well be that the involvement in this process of a specific constitutional function and its internal dynamics deserve an overall analysis. Consequently, there have been several attempts to classify the different strands comprising Global Constitutionalism based on the object of the analysis or the approach adopted, with conflicting results.[38]

Nevertheless, the only meaningful distinction that will be taken into account in this thesis – and merely for the purpose of giving a logical structure to the work – is the rather simple one between positive analyses, which have the aim of mapping already existing constitutional features of the international legal order, and normative analyses, directed at making proposals for the way forward.[39]

In fact, the following sections will deal with a few selected reconstructions carried out in the Global Constitutionalism literature with a view to briefly outlining them and to appreciating the role that the exercise of judicial functions plays among them.[40] Therefore, this chapter does not purport to constitute a comprehensive analysis of Global

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CHRISTINE E. J. SCHWÖBEL, *Situating the Debate on Global Constitutionalism*, 8 (3) *International Journal Constitutional Law*, 2010, p. 622.

[38] AOIFE O'DONOGHUE, *Constitutionalism in Global Constitutionalisation*, Cambridge 2014, pp. 140-151 (differentiating between two forms of constitutionalization: sectoral constitutionalism and world order constitutionalism); CHRISTINE E. J. SCHWÖBEL, *Situating the Debate on Global Constitutionalism*, 8 (3) *International Journal Constitutional Law*, 2010, pp. 613-634 (mentioning four dimensions of Global Constitutionalism: social, institutional, normative and analogical while admitting that "all categorizations are also simplifications."); ANTJE WIENER ET AL., *Global Constitutionalism: Human rights, Democracy and the Rule of Law*, 1(1) *Global Constitutionalism*, 2012, pp. 6-10 (organizing the debate in terms of three schools: functionalist, normative and pluralist); CHERYL SUNDERS, *Global Constitutionalism: Myth and Reality*, in JASON NE VARUHAS AND SHONA WILSON STARK, *The Frontiers of Public Law*, Oxford 2019, p. 20 (identifying "at least three strands of thought" in global constitutionalism).

[39] ANNE PETERS, *Global Constitutionalism*, in MICHAEL T. GIBBONS, *The Encyclopedia of Political Thought*, Malden 2014, p. 1.

[40] For an analysis of the role and features of the judicial function in the international legal order *see* § II.1.

Constitutionalism theories – which would seem unrealistic given the multitude of different "strands" – but attempts to identify common patterns as to a crucial aspect in the alleged processes of constitutionalization.

More specifically, the first part will address the constitutional overviews of three major international organizations: the United Nations, the World Trade Organization and the European Union.[41] The choice has fallen on these institutions because their status is highly debated by numerous scholars and is regularly brought up in the debate on Global Constitutionalism.[42] In any event, it seems productive to analyze institutions that are clearly at a different stage as a matter of constitutional developments and have different backgrounds and objectives, on a global, regional or sectoral level.

The second part will focus on two theories originated in response to two recent transformations in the domain beyond the State with important consequences on the issues discussed later in this thesis: the compensatory function of international law for domestic legal orders and the increasing involvement of private subjects in the international sphere. Interestingly, as mentioned above, these developments represent two prominent consequences prompted by globalization.

The conclusion of this chapter will draw on the critics and remarks made in general on Global Constitutionalism to clarify the merits and limits of these reconstructions, with special emphasis on the influence of the judicial function on constitutionalization processes.

[41] The role of the EU will be particularly important in light of the analysis of intra-EU investment arbitration and the impact of the *Achmea* judgment conducted in § III.2.2

[42] For instance, *see* the contributions mentioned *supra* in note 1. *See also* additional bibliographical references in the following sections.

2. Positive Analysis of International Organizations and their Constitutional Qualities

2.1 The United Nations Charter as a Global Constitution: The Problem of Judicial Review

The idea that the Charter of the United Nations ('UN') could have a constitutional value goes back to the years immediately following the signing of that treaty in 1945.[43] It was advanced at various times even more recently, often recurring in the discourse over Global Constitutionalism, [44] and this is not surprising at all. In fact, the ambitious objectives pursued – primarily the assurance of international peace and security after the shock of the Second World War[45] – and its innovative and complex structure represented

[43] *See e.g.*, ALF ROSS, *Constitution of the United Nations: Analysis of Structure and Function*, New York 1950, pp. 30 ff., who especially stressed the legislative intentions of UN members during the negotiations and made a number of observations on the amendment procedure regulated by Articles 108-109 of the Charter and the supremacy clause established by Article 103, concluding that "*in a systematic respect the Charter is a constitution*." (emphasis in original) and ALFRED VERDROSS, *General International Law and the United Nations Charter*, 30 (3) *International Affairs*, 1954, pp. 342 ff., whose characterization of the Charter as a "world law" was largely based on its compulsoriness upon non-member States. For a comprehensive summary of Verdross' elaborations in this regard *see* BRUNO SIMMA, *The Contribution of Alfred Verdross to the Theory of International Law*, 6 *European Journal of International Law*, 1995.

[44] *See* the following notable articulations of this theory MICHEAL W. DOYLE, *The UN Charter and Global Constitutionalism*, in ANTHONY F. LANG AND ANTJE WIENER, *Handbook on Global Constitutionalism*, Cheltenham 2017; BARDO FASSBENDER, *The United Nations Charter as the Constitution of the International Community*, Leiden 2009; BARDO FASSBENDER, *Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order*, in JEFFREY L. DUNOFF AND JOEL P. TRACHTMAN, *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge 2009; JÜRGEN HABERMAS, *The Divided West*, translated by Ciaran Cronin, Cambridge 2006; RONALD ST. J. MACDONALD, *The Charter of the United Nations as a World Constitution*, in MICHAEL N. SCHMITT, *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of His Eightieth Birthday*, Newport 2000; PIERRE-MARIE DUPUY, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 *Max Planck Yearbook of United Nations Law*, 1997. *See also* CHRISTIAN TOMUSCHAT, *The United Nations at Age Fifty: A Legal Perspective*, The Hague 1995 (stating that "it has become obvious in recent years that the Charter is nothing else than the Constitution of the international community . . . It may not be fully satisfactory as a world constitution, not having been conceived of for that function in 1945. But it is the only written text binding upon all states of this globe which sets forth firm determinations on the general issues which make up the hard core of any system of governance").

[45] Charter of the United Nations, 1 United Nation Treaty Series ('UNTS') XVI, dated 26 June 1945 ('UN Charter' or 'Charter'), Article 1, defining the purposes of the UN. *See also* UN Charter, Preamble ("We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to

a groundbreaking experiment in the international arena.[46] Therefore, it is logical that the UN Charter would have come to be a prototype of the constitutionalization process in the international field, targeted by numerous studies aimed at understanding the governance of a legal order comprising almost the entirety of the existing States and, as such, universal.

As a matter of fact, the main argument adduced by those who advocate its constitutional character is that the Charter provides for the governance of the United Nations in a way that resembles classic constitutions at the national level. As stated by Fassbender:

> It is the typical minimum quality of a constitutional instrument that it provides for the performance of basic functions of governance, that is to say, of making and applying the law and adjudicating legal claims. It has rightly been observed that the three functions are performed by the international community, though still in a way much less refined than in developed national systems of law. The Charter includes express provisions relating to legislation, application of law, and adjudication.[47]

More specifically, the Charter designates the organs of the United Nations, detailing their composition and functions.

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reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.").

[46] *See* JÜRGEN HABERMAS, *The Divided West*, translated by Ciaran Cronin, Cambridge and Malden 2006 (pointing out three core differences between the system of the League of Nations and the UN, namely: the promotion of human rights, the provision of sanctions in case of the violation of the prohibition of the use of violence, and the inclusiveness of the organization).

[47] BARDO FASSBENDER, *The United Nations Charter as the Constitution of the International Community*, p. 95; RONALD ST. J. MACDONALD, *The Charter of the United Nations as a World Constitution*, in MICHAEL N. SCHMITT, *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of His Eightieth Birthday*, Newport 2000, pp. 268 ff. *See also* a speech delivered by the then Secretary of the United Nations DAG HAMMARSKJÖLD, *International Cooperation Within the United Nations: Address at University of California*, United Nations Convocation, Berkeley, dated 25 June 1955 ("In the United Nations, as set up by the Charter, you also find the problem of maintaining balance of power between organs which bear resemblance, although but superficially, to the executive, judiciary and legislature of a government. Instead of a parliament we have the General Assembly; in place of the judiciary, the International Court of Justice; in place of the executive, the three Councils and the Secretariat under the Secretary General.").

Among them, the Security Council – an organ where representatives of the victorious allied powers permanently seat[48] – is predominant because it allegedly undertakes tasks that share similarities with both legislative and executive functions.[49] On the one hand, pursuant to Chapter VII, the Security Council may issue resolutions binding on all UN members, in accordance with Article 25 of the Charter.[50] On the other hand, Article 24 confers the responsibility to safeguard international peace and security upon the Security Council, which acts on behalf of the Member States in this field, under the condition of respecting UN Purposes and Principles.[51] Most importantly, in carrying out this fundamental task, it has the power to authorize military actions, giving rise to a monopoly on the legitimate use of force at the international level.[52] In addition, the Security Council is entrusted with quasi-judicial tasks, including the possibility of investigating and settling disputes between States, but taking also into account implicit judicial determinations made in the exercise of its other functions.[53]

Strikingly, the General Assembly, where all member States are represented, contributes only marginally to the governance of the UN, being ousted on account of the

[48] UN Charter, Article 23.

[49] The discussion over the nature of the Security Council's tasks is clearly extensive. For a remarkable assessment of an eminent public international law scholar that underlines a number of critical issues in this respect *see* GEORGES M. ABI-SAAB, *The Security Council as Legislator and as Executive in its Fight Against Terrorism and Against Proliferation of Weapons of Mass Destruction: The Question of Legitimacy*, in RÜDIGER WOLFRUM AND VOLKER RÖBEN (Eds.), *Legitimacy in International Law*, New York 2008, pp. 109 ff.

[50] UN Charter, Article 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter") and Article 41 ("The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."). For a review of the activity of the Security Council in this regard, with many references to the various contexts in which such authority was exercised, including counterterrorism *see* VESSELIN POPOVSKI AND TRUDY FRASER (Eds.), *The Security Council as Global Legislator*, New York 2014.

[51] UN Charter, Article 24. *See* PIERRE-MARIE DUPUY, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 *Max Planck Yearbook of United Nations Law*, 1997, pp. 28 ff. with a critical assessment of the Security Council's credibility as the "World Executive."

[52] UN Charter, Article 42.

[53] KEITH HARPER, *Does the United Nations Security Council have the competence to act as court and legislature?*, 27 *New York University Journal Of International Law & Politics*, 1994. Besides, the Security Council may also establish *ad hoc* international criminal tribunals, as it has done in the cases of the former Yugoslavia and Rwanda, even though such power is not explicitly listed in the UN Charter. This confirms that the powers of this organ have been interpreted extensively.

overwhelming powers of the Security Council.[54] Certainly, it cannot be considered a lawmaking body in the traditional sense, even though according to the UN Charter it shall encourage "the progressive development of international law and its codification."[55] Yet, notwithstanding their non-binding effects,[56] UN General Assembly's resolutions have come to acquire a prominent role in the development of soft law and are considered as an indicator of state practice and *opinio iuris* for the formation of international custom.[57]

Finally, the International Court of Justice ('ICJ'), as detailed below, is defined as "the principal judicial organ of the United Nations" with the capacity of issuing binding decisions upon all the members, in accordance with the Statute of the ICJ, which forms an integral part of the UN Charter.[58]

In terms of substance, two underlying aspects of the Charter's scope of application are regularly brought up in favor of its interpretation as a world constitution.[59]

First, the UN Charter represents an attempt to create a hierarchy in the international legal order, similarly to most constitutions at the national level.[60] Indeed, under Article 103 UN member States' obligations under the Charter – including those

[54] There have been attempts to expand the competence of the UN General Assembly. UN General Assembly, Resolution 377 (V) 1950, UN Doc. A/RES/377 (V), dated 3 November 1950 (providing for a possibility for the General Assembly to intervene in the area of international peace and security in cases where the UN Security Council is idle.). However, the legitimacy of such attempts is deeply contested, with particular regard to their status under customary international law. *See* VINCENZO CANNIZZARO, *Diritto Internazionale*, Torino 2016, pp. 63-64.
[55] UN Charter, Article 13.1 (a). *See* extensively CARL-AUGUST FLEISCHHAUER AND BRUNO SIMMA, *Article 13*, in BRUNO SIMMA ET AL., *The Charter of the United Nations: A Commentary Volume I*, 3rd Edition, Oxford 2012, p. 528 ("At the San Francisco Conference, all attempts to give the GA any power to establish the content of international law with binding force were rejected.").
[56] UN Charter, Article 10.
[57] *See* MICHAEL WOOD, Special Rapporteur, *Second Report on Identification of Customary International Law*, UN Doc. A/CN.4/672, dated 22 May 2014., pp. 27 and 65 ff.
[58] UN Charter, Chapter XIV.
[59] RONALD ST. J. MACDONALD, *The Charter of the United Nations as a World Constitution*, in MICHAEL N. SCHMITT, *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of His Eightieth Birthday*, Newport 2000, p. 272 ("Article 2.6, together with Article 103, represents the strongest suggestion that the Charter of the United Nations may be seen as a constitutional charter.")
[60] BARDO FASSBENDER, *The United Nations Charter as the Constitution of the International Community*, p. 103; PIERRE-MARIE DUPUY, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 *Max Planck Yearbook of United Nations Law*, 1997, pp. 12-13 (with critical remarks on the impact of Article 103 of the UN Charter).

arising from Security Council's resolutions[61] – prevail on any other international agreement those States are parties to.[62]

This mechanism would have marked a revolution in the normative system of international law, yet the scope of its operation is anything but certain.[63] For instance, it has been argued that, based on the *travaux préparatories* and the practical cases in which it was applied, the scope of this provision does not extend to obligations under customary international law.[64]

Second, it is affirmed that the Charter has universal application, in contradiction with the adage *pacta tertiis neque nocent neque iuvant*.[65] Pursuant to Article 2.6, the UN shall ensure that non-member States "act in accordance" with the Principles provided for in the Charter itself. Basically, non-member States are placed at the same level of member States in relation to a treaty to which they are not parties.[66]

Along these lines, States' sovereignty would be limited in this case regardless of consent, since non-member States would be subject to the same set of rules of member

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[61] JOHANN RUBEN LEIÆ AND ANDREAS PAULUS, *Article 103*, in BRUNO SIMMA ET AL., *The Charter of the United Nations: A Commentary Volume II*, 3rd Edition, Oxford 2012, p. 2124; ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom; Libya v. United States), Orders, in *ICJ Reports 1992*, dated 14 April 1992, para. 39.

[62] UN Charter, Article 103 ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.").

[63] As argued by VINCENZO CANNIZZARO, *Diritto Internazionale*, Torino 2016, p. 243. *See also* Vienna Convention on the Law of Treaties, 1155 UNTS 331, dated 23 May 1969 ('VCLT'), Article 30 (expressly excluding Article 103 from the scope of application of rules concerning successive treaties relating to the same subject matter.)

[64] RAIN LIIVOJA, *The Scope Of The Supremacy Clause Of The United Nations Charter*, 57 *International and Comparative Law Quarterly*, 2008, p. 612 (also stating that "when interpreting Article 103, one should be particularly careful not to put too much emphasis on the idea of the Charter as a 'world constitution'."). *Contra* JOHANN RUBEN LEIÆ AND ANDREAS PAULUS, *Article 103*, in BRUNO SIMMA ET AL., *The Charter of the United Nations: A Commentary Volume II*, 3rd Edition, Oxford 2012, p. 2133.

[65] UN Charter, Article 2.6 ("The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security."). *See* BARDO FASSBENDER, *The United Nations Charter as the Constitution of the International Community*, p. 109; RONALD ST. J. MACDONALD, *The Charter of the United Nations as a World Constitution*, in MICHAEL N. SCHMITT, *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of His Eightieth Birthday*, Newport 2000, p. 273.

[66] UN Charter, Article 2.6.

States for the purpose of maintaining international peace and security.[67] Conversely, certain authors claim that this provision should be applied in accordance with the general law of the treaties since the system of collective security enshrined in the UN Charter has become binding as a matter of customary international law.[68]

On a separate note, the issue of human rights protection remains in the background as far as the Charter is concerned.[69] The Security Council can take actions solely when there are threats to international peace and security, while the violation of human rights does frequently take place at the domestic level.[70] Therefore, the UN has intervened to safeguard human rights only in exceptional circumstances.[71] In this regard, the so-called International Bill of Human Rights – whilst set up under the auspices of the UN – constitutes a distinct and separate framework, with different membership and effectiveness.[72]

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[67] For a discussion of the issue of the relationship between the UN and non-member States, a topical theme in the years following the signing of the UN Charter that has lost its importance given the almost universal enlargement of its membership, *see* BENEDETTO CONFORTI, *The Law and Practice Of The United Nations*, 3rd edition, Leiden 2005, pp. 126-130.

[68] VCLT, Article 34. *See* STEFAN TALMON, *A Universal System of Collective Security Based on the Charter of the United Nations: A Commentary on Article 2(6) UN Charter*, *Bonn Research Papers on Public International Law*, Paper No 1/2011.

[69] *See e.g.*, UN Charter, Article 55 (c) (stating that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."); *id.*, Article 13.1 (b) (providing for an additional competence of the UN General Assembly in "assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.")

[70] In this regard, it must be noted that the Charter specifically excludes the possibility to intervene in the internal affairs of UN member States. *Id.*, Article 2 (7). For a review of the status of the principle of non-intervention at the United Nations *see* BENEDETTO CONFORTI, *The Law and Practice Of The United Nations*, 3rd edition, Leiden 2005, pp. 130-143.

[71] *See e.g.*, the contemporaneous analysis of the period in the aftermath of the end of the Cold War in which the UN Security Council was increasingly engaged with so-called humanitarian interventions ADAM ROBERTS, *Humanitarian war: military intervention and human right*, 69 (3) *International Affairs*, 1993.

[72] The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols. Incidentally, the constitutional nature of these instruments is also intensely discussed. *See e.g.*, STEPHEN GARDBAUM, *Human Rights as International Constitutional Rights*, 19 (4) *European Journal of International Law*, 2008. In addition, it was suggested that the UN Charter acts as a "framework constitution," complemented by the International Bill of Human Rights and other treaties, including the Genocide Convention and the Rome Statute of the International Criminal Court. BARDO FASSBENDER, *Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order*, in JEFFREY L. DUNOFF AND JOEL P. TRACHTMAN,

In light of the above, it is clear that even the advocates of a constitutional perspective of the UN Charter are aware of the unsuitability of an actual comparison with national constitutions.[73] Besides, many critical arguments can be opposed to such a claim.

To begin with, as a living instrument, the UN Charter has become an influential driving force in the development of international law but there have also been numerous circumstances in which the UN was incapable of discharging even its most fundamental responsibilities, precisely on accounts of the inadequacy of its governance.[74] As known, Article 27 of the UN Charter recognizes upon the five permanent members of the Security Council a right to veto any non-procedural resolution, a feature that has almost entirely paralyzed the Security Council during the Cold War and still prevents it to take action in a variety of occasions.[75] Notably, major remarks were addressed to the Security Council's composition and voting system, which have led to strong requests to reform this body, with mixed results.[76]

Ruling the World? Constitutionalism, International Law, and Global Governance, Cambridge 2009, pp. 145-146.

[73] PIERRE-MARIE DUPUY, *The Constitutional Dimension of the Charter of the United Nations Revisited*, 1 *Max Planck Yearbook of United Nations Law*, 1997, p. 15 ("concluding that "the substantially 'constitutional' dimension of the Charter gives rise to some important unresolved questions. It is, at the same time, *irrefutable* and *uncompleted*.") (emphasis in original); BARDO FASSBENDER, *Rediscovering a Forgotten Constitution: Notes on the Place of the UN Charter in the International Legal Order*, in JEFFREY L. DUNOFF AND JOEL P. TRACHTMAN, *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge 2009, p. 145 (recognizing that: "To regard the Charter as the constitution of the international community does not mean to equate it with a national constitution, such as that of the United States, or the constitution of highly integrated regional association of states, such as the European Union" because "the constitutional idea in (global) international law must be understood as an autonomous concept.").

[74] For an appraisal of the UN role over the 20th century put forward by an eminent ICJ judge *see* ROSALYN HIGGINS, *Peace and Security: Achievements and Failures*, 6 *European Journal of International Law*, 1995, p. 445.

[75] UN Charter, Article 27.3. *See* extensively ANDREAS ZIMMERMANN, Article 27, in BRUNO SIMMA ET AL., *The Charter of the United Nations: A Commentary Volume II*, 3rd Edition, Oxford 2012, p. 874. Recently, the use of veto prevented an intervention of the UN in the context of the civil war in Syria. *See* PHILIPPA WEBB, *Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria*, 19 (3) *Journal of Conflict and Security Law*, 2014 (suggesting that the veto might have the alternative function of encouraging discussion in relation to the use of means of conflict-resolution other than the use of force.).

[76] BARDO FASSBENDER, *All Illusions Shattered: Looking Back on a Decade of Failed Attempts to Reform the UN Security Council*, 7 *Max Planck Yearbook of United Nations Law*, 2003.

In addition, it was authoritatively argued that the UN Charter – as the constituent instrument of an international organization – clearly defines the powers of its essential organs. However, analogically ascribing such organs to the theory of the separation of powers is simply not enough to allow a constitutional reading of the Charter.[77] As stated by the ICJ, the "constituent instruments of international organizations are multilateral treaties" from the simple perspective of international law.[78]

Aside from this, in a much critical appraisal of analogies between the UN Charter and federal constitutions, Gaetano Arangio Ruiz underlines various items of "circumstantial evidence" pointing to its nature as a mere treaty establishing an association between States.[79]

First of all, the Italian jurist maintains that there was no will of creating a "super-state" among the participants to the San Francisco Conference,[80] as confirmed by the fact that the Charter does not qualify itself as a constitution and instead details how to preserve the sovereign equality of the member States.[81] The crucial point is that the UN Charter does not introduce new elements to the traditional structure of international law. In fact, the Charter continues to rely only on States and their representatives and does not seriously call into question the dynamics of sovereignty.[82] Further, the actions of the

[77] MICHAEL WOOD, *'Constitutionalization' of International Law: A Sceptical Voice*, in KAIYAN H. KAIKOBAD AND MICHAEL BOHLANDER (Eds.), *International Law and Power: Perspectives on Legal Order and Justice Essays in Honour of Colin Warbrick*, Leiden 2009, p. 93. *See also* JAMES CRAWFORD, *The Charter of the United Nations as a Constitution*, in HAZEL FOX (Ed.), *The Changing Constitution of the United Nations*, London 1997 (stressing the lack of a solid basis of constitutional analogies.").

[78] ICJ, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, in *ICJ Reports 1996*, dated 8 July 1996, para. 19.

[79] GAETANO ARANGIO-RUIZ, *La pretesa "analogia federale" nella Carta delle Nazioni. Unite e le sue implicazioni*, Torino 2000. *See also* BENEDETTO CONFORTI, *The Law and Practice Of The United Nations*, 3rd edition, Leiden 2005, p. 10 (stating that the "constitutional aspect of the UN should not be exaggerated. The Charter is and remains a treaty.").

[80] ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, in *ICJ Reports 1949*, dated 11 April 1949, p. 179 (recognizing the international legal personality of the UN but immediately clarifying that: "This is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is the same thing as saying that it is a 'super-State', whatever that expression means.")

[81] GAETANO ARANGIO-RUIZ, *La pretesa "analogia federale" nella Carta delle Nazioni. Unite e le sue implicazioni*, Torino 2000, pp. 8-9, 31.

[82] *Id.*, p. 18; CHRISTIAN WALTER, *International Law in a Process of Constitutionalization*, in ANDRÉ NOLLKAEMPER AND JANNE E. NIJMAN, *New Perspectives on the Divide Between National*

Security Council under the UN Charter do not have a universal scope, as it would be the case in a national constitution, but they are plainly confined to the specific – albeit crucial – objective of the maintenance of international peace and security.[83] This restriction constitutes a *ratione materiae* limitation to the acts of the Security Council, which is additionally hindered by the political problems related to its operation. The fact that the so-called International Bill of Rights is often taken into account – even assuming that other documents and treaties adopted by the UN General Assembly might have a constitutional nature – only confirms that the UN Charter is not a self-sufficient constitution of the international legal order.

Finally, when it comes to analyze the exercise of judicial functions in connection with the UN Charter, the challenges to a constitutional reading of this treaty become even more clear.[84]

In this regard, it must be stressed that the pacific settlement of disputes is a principle that informs the UN Charter and the ICJ was of paramount importance for going beyond the use of force as the preferred way to resolve international controversies.[85] The jurisprudence of the ICJ has also contributed to introduce constitutional qualities in the international legal order, the primary example of which is the development of the notion of *erga omnes* obligations.[86] Notoriously, in an *obiter dictum* forming part of the decision

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and International Law, 2007, pp. 195-196 (affirming that there "can be no doubt that the Charter is the constitutive document of a community of States. In that sense it forms part of the traditional fabric of international law as a law between States."); ERIKA DE WET, *The International Constitutional Order*, 55 (1) I*nternational and Comparative Law Quarterly*, 2006, p. 54.

[83] MICHEAL W. DOYLE, *The UN Charter and Global Constitutionalism*, in ANTHONY F. LANG AND ANTJE WIENER, *Handbook on Global Constitutionalism*, Cheltenham 2017, pp. 339-340; GAETANO ARANGIO-RUIZ, *La pretesa "analogia federale" nella Carta delle Nazioni. Unite e le sue implicazioni*, Torino 2000, pp. 43-44.

[84] This is also conceded by authors discussing the constitutional nature of the UN Charter. *See* BARDO FASSBENDER, *The United Nations Charter as the Constitution of the International Community*, Leiden 2009, pp. 99-100 (recognizing that the judicial function of the UN appears "underdeveloped."); RONALD ST. J. MACDONALD, *The Charter of the United Nations as a World Constitution*, in MICHAEL N. SCHMITT, *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of His Eightieth Birthday*, Newport 2000 (stating that "the constitutional reach of these provisions is limited jurisdictionally").

[85] UN Charter, Articles 2 (3) ("'All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.") *See also* § II.1.2.

[86] BARDO FASSBENDER, *The United Nations Charter as the Constitution of the International Community*, p. 125. *See also* ERIKA DE WET, *The International Constitutional Order*, 55(1)

in the *Barcelona Traction* case, the ICJ identified a peculiar category of obligations and stated that "all States can be held to have a legal interest in their protection."[87] However, *erga omnes* obligations were not conceived in the UN Charter and they still depend on the actions of individual States to be enforced.[88]

In any event, it is possible to identify three major flaws that have an impact on the effectiveness of the primary UN judiciary organ, at least from the perspective of a constitutional analogy.

First, the jurisdiction of the ICJ is not truly compulsory.[89] Whether by means of a special agreement, a clause in a treaty to which the parties adhere, a reciprocal and rarely unconditional declaration recognizing the Court's jurisdiction in the context of legal disputes or the subsequent acceptance after the beginning of a case, the ICJ needs the consent of the parties in order to decide a case. This implies that States can – and actually did – escape the jurisdiction of the Court by simply not opting in.[90]

Second, only States might be parties in a contentious case before the ICJ. Other recognized subjects of international law, such as international organizations,[91] or private

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I*nternational and Comparative Law Quarterly*, 2006, p. 57 (accounting *erga omnes* obligations as a manifestation of the emerging hierarchy of international law.).

[87] ICJ, *Case concerning the Barcelona Traction, Light and Power Company Limited* (Belgium v. Spain), Judgment, in *ICJ Reports 1970*, dated 5 February 1970, para. 33. *See also* ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, in *ICJ Reports 2004*, dated 9 July 2004.

[88] *See* extensively CHRISTIAN J. TAMS, *Enforcing Obligations* Erga Omnes *in International Law*, Cambridge 2005.

[89] Statute of the International Court of Justice, Annex to the UN Charter ('ICJ Statute'), Article 36.

[90] In total, only 74 States out of the 193 UN Members have deposited declarations recognizing the jurisdiction of the Court as compulsory, albeit often accompanying them with certain conditions. Declarations recognizing the jurisdiction of the Court as compulsory, *available at https://www.icj-cij.org/*. *See also* ONUMA YASUAKI, *Is the International Court of Justice An Emperor Without Clothes?*, 8 (1) *International Legal Theory*, 2002, p. 12 (stressing the shortcomings of the ICJ compared to domestic jurisdictions). Compliance is another critical issue in terms of the ICJ effectiveness, some examples of which are given by ALOYSIUS P. LLAMZON, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 (5) *The European Journal of International Law*, 2008.

[91] The UN through the General Assembly and the Security Council or a specialized agency might submit a request for an advisory opinion on a legal matter, but the decision of the Court is not *legally* binding, no matter how much persuasive it is. UN Charter, Article 96; ICJ Statute, Articles 65-68. See, however, ERIKA DE WET, *The Chapter VII Powers of the United Nations Security Council*, Oxford 2004, pp. 25-68 for an assessment of the use of advisory opinions as a mean of

parties, such as individuals, NGOs and non-State actors in general do not have access to the contentious jurisdiction of the Court. Therefore, the traditional structure of international law is confirmed by the way the judicial function is exercised within the UN system, undermining the prospects of a catch-all concept of "international community."[92]

Third, the UN Charter does not provide for judicial review over the conducts of UN organs.[93] This means that a member State cannot directly challenge the legality of a measure taken by the Security Council *ultra vires*, even assuming that there are substantial limits to its actions, given the vague formulation of the Charter.[94] In addition, even though the idea that the ICJ can exercise such authority within a contentious proceeding is highly debated, the Court has shown a certain reluctance with respect to the opportunity of invading the Security Council's sphere of competence.[95]

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judicial review. The two most notable examples cited by the author are ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, in *ICJ Reports 1971*, dated 21 June 1971, p. 16; ICJ, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, in *ICJ Reports 1962*, dated 21 June 1962, p. 151.

[92] For an examination of the significance of the term "international community" *see* BRUNO SIMMA AND ANDREAS L. PAULUS, *The 'International Community': Facing the Challenge of Globalization*, 9 *European Journal of International Law*, 1998, pp. 266 ff.

[93] This was also the express intention of the UN Charter's drafters, as confirmed by the ICJ. *See* ICJ, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, in *ICJ Reports 1962*, dated 21 June 1962, p. 21 (stating that: "Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an *advisory* opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction.") (emphasis in original).

[94] In this regard, *see* the decision of the ICTY, *The Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, dated 2 October 1995, para. 28 ("The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law)."). For an extensive overview of the limits to the Security Council's discretion to use the powers conferred upon it by the UN Charter, including an examination of the impact of *jus cogens* norms *see* ERIKA DE WET, *The Chapter VII Powers of the United Nations Security Council*, Oxford 2004, pp. 133 ff.

[95] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, in *ICJ Reports 1971*, dated 21 June 1971, p. 16, para. 89 ("Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations

Notably, the question was posed in the *Lockerbie* case, concerning Libya's challenges over the legality of a Security Council's resolution issued in the aftermath of its refusal to surrender the individuals accused of a terrorist attack in the United Kingdom.[96] The ICJ did not rule on the merits of the dispute because the parties found an agreement to settle their differences; therefore, the Court did not have the occasion to definitively clarify whether it could exercise judicial review on Security's Council's resolutions in a contentious case.[97]

In view of the foregoing, even considering its limited scope and different size, it is hard to affirm that the UN charter does effectively guarantee human rights and the separation of powers in the UN framework. Indeed, as seen above, the Security Council has a wide scope of action as a decision-making body, which comprises functions that at the State level are split between different organs, and with good reasons. But there is more to that, since the Security Council has also a considerable amount of discretion in exercising these functions. Ultimately, those who suffered injuries from a resolution of the Security Council do not enjoy the possibility of seeing their rights enforced inside the UN system for a twofold reason: they would probably lack the capacity of directly accessing the jurisdiction of the ICJ and would not have the chance of seeing the legality of such measures challenged in front of the Court.

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organs concerned"). However, in other cases the Court had seemed more open to this possibility. ICJ, *Conditions of Admission of a State to Membership in the United Nations (Article 4 Of The Charter*, Advisory Opinion, in *ICJ Reports 1948*, dated 28 Mary 1948, p. 57, para. 89 ("The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment.").

[96] ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom; Libya v. United States), Orders, in *ICJ Reports 1992*, dated 14 April 1992.

[97] The literature on this issue is very wide, *see e.g.*, BERND MARTENCZUK, *The Security Council, the International Court and judicial review: what lessons from Lockerbie?*, 10 (3) *European Journal of International Law*, 1999; DAPO AKANDE, *The ICJ and the Security Council: Is There Room for Judicial Control of the Decisions of the Political Organs of the UN?*, 46 (2) *International and Comparative Law Quarterly*, 1997, p. 342 (arguing that the ICJ "should not abdicate that responsibility by overly deferring to legal determinations made by other organs even when that involves determining the legal limits of the powers of that organ."); KEN ROBERTS, *Second-guessing the Security Council: The International Court of Justice and Its Powers of Judicial Review*, 7 (2) *Pace International Law Review*, 1995, p. 309 (stating that "it would be inaccurate to portray *Lockerbie* as the international equivalent of *Marbury*.").

This is exactly what happened in relation to the sanctions regime established by the Security Council to fight *al Qaeda* and international terrorism.[98]

Individuals whose assets were frozen pursuant to the Security Council's resolutions were not in a position to challenge the legality of these measures. On one hand, they could not argue that they were unreasonable or that they lacked proportionality, because they did not even specify the grounds on which they were based. On the other hand, there was no judicial review mechanism available in the UN and they could not appear in front of the Court as individuals.[99] Eventually, as will be shown below, they were forced to bring their claims outside the UN system.[100] Only then the Security Council established an independent Ombudsperson tasked with the review of the list of individuals targeted by the *al Qaeda* sanctions regime. Still, such body has no actual judicial power, since the final decision of delisting a person is ultimately reserved to the Security Council.[101]

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[98] Originally the regime was established by United Nations Security Council Resolution 1267 (1999), UN Doc. S/RES/1267 (1999), dated 15 October 1999. It was subsequently amended several times in the last two decades. *See inter alia* United Nations Security Council Resolution 1373 (2001), UN Doc. S/RES/1373 (2001), dated 28 September 2001, adopted in the aftermath of the terrorist attacks of 11 September 2001. The resolutions also established a Sanctions Committee with the purpose of reviewing and updating the list of targeted individuals. *See* extensively MATTHEW HAPPOLD AND PAUL EDEN, *Economic Sanctions and International Law*, Portland 2016.

[99] For the contemporaneous analysis of these issues submitted by the General Counsel of the Swedish mission to the UN *see* ELIN MILLER, *The Use of Targeted Sanctions in the Fight Against International Terrorism—What About Human Rights?*, 97 *Proceedings of the Annual Meeting of the American Society of International Law*, 2003, pp. 46 ff.

[100] The significance of the *Kadi* case for the relationship between the EU legal order and the UN will be dealt with in a subsequent section. *See* § I.2.3. At this stage, it suffices to recall that the Court of Justice of the European Union ('CJEU') decided that the sanctions regime was in conflict with the fundamental rights of the claimant, including its right to property and its right to be heard. CJEU, Grand Chamber, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Judgment, dated 3 September 2008, paras. 331-371. *See also* extensively MATEJ AVBELJ, FILIPPO FONTANELLI, GIUSEPPE MARTINICO (Eds.), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial*, Oxon 2014.

[101] United Nations Security Council Resolution 1904 (2009), UN Doc. S/RES/1904 (2009), dated 17 December 2009. This was also confirmed by the CJEU subsequently. *See* CJEU, Grand Chamber, joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others v Yassin Abdullah Kadi*, Judgment, dated 18 July 2013. For a critical appraisal of the Ombudsperson and its prospective compatibility with the EU framework *see* PAUL EDEN, *United Nations Targeted Sanctions, Human Rights and the Office of the Ombudsperson*, in MATTHEW HAPPOLD AND PAUL EDEN, *Economic Sanctions and International Law*, Portland 2016.

In conclusion, the greatest lacuna of the UN Charter lies in its failure to provide for an even rudimentary system of checks and balances, as found in national constitutions but also in the constituent instruments of other international organizations, with a view to resolving internal conflicts and implementing its provisions.[102]

As argued by other commentators, in the current framework of the UN Charter the only available check is the *de facto* non-compliance with Security Council's resolutions, but this drastic remedy surely does not belong to a constitutional legal order.[103]

2.2 The World Trade Organization and its Path to Constitutionalization: Remarks over the Appellate Body

The UN Charter represents the broader context to which it is possible to apply constitutional categories in the international legal order, but there have been attempts even on a smaller scale. Actually, there has been an explosion of the literature pursuing the analysis of constitutional features in specific sectors or international institutions.[104]

These so-called micro-constitutionalism theories have the benefit of limiting the analysis to a specific institution or a certain area of international law in an effort to find a common pattern and identifying potential consequences for the global order.[105] In this context, the studies concerning the constitutionalization of the World Trade Organization ('WTO') are especially relevant because this institution is linked to economic development and integration – an overarching issue in the era of globalization

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[102] THOMAS GIEGERICH, *The Is and Ought of International Constitutionalism: How Far Have We Come on Habermas's Road to a Well-Considered Constitutionalization of International Law*, 10 *German Law Journal*, 2009, p. 45 ("For any charter to qualify as a constitution in the normative sense, its provisions must be effectively implemented, and this cannot be done without at least some jurisdiction of courts in constitutional matters."). *See also* MICHAEL W. REISMAN, *The Constitutional Crisis in the United Nations*, 87 *American Journal of International Law*, 1993, p. 95 (suggesting that "the only real control was the veto assigned to the permanent members of the Council.").

[103] JULIAN ARATO, *Constitutionality and Constitutionalism Beyond the State: Two Perspectives on the Material Constitution of the United Nations*, 10 (3) *International Journal of Constitutional Law*, 2012, pp. 658-659. For a comprehensive analysis of States' refusal to comply with resolutions of the Security Council *see* SUFYAN DROUBI, *Resisting United Nations Security Council Resolutions*, Oxon and New York 2014.

[104] *See e.g.*, in the context of international law at sea SHIRLEY V. SCOTT, *The LOS Convention as a Constitutional Regime for the Oceans*, in ALEX G. OUDE ELFERINK, *Stability And Change in the Law of the Sea: The Role of the Los Convention*, Leiden and Boston 2005.

[105] CHRISTINE E. J. SCHWÖBEL, *Situating the Debate on Global Constitutionalism*, 8 (3) *International Journal Constitutional Law*, 2010, pp. 623-624.

– and it is relatively recent, since the treaty establishing the WTO was signed on 15 April 1994.[106]

Notoriously, the WTO is part of the so-called international economic law and is designed to develop "an integrated, more viable and durable multilateral trading system" that draws from the achievements of the General Agreement on Tariffs and Trade ('GATT') of 1947.[107] The WTO basically provides a "common institutional framework for the conduct of trade relations" which are disciplined by distinct agreements and other legal instruments whose purpose is to derive economic benefits from liberalization.[108]

Those who claim that there is an ongoing process of constitutionalization of this organization rely on a variety of reasons for such allegation, including the governance system envisaged by the treaty, the existing value system at the core of the WTO and its constitutional qualities, and the implementation of trade-related principles through an highly influential judiciary.[109]

Initially, scholars pointed to the architecture of the organization, underlining the major shift from the inter-governmental approach that characterized the 1947 GATT to a

[106] WTO, Marrakesh Agreement Establishing the World Trade Organization, 1867 UNTS 154, dated 15 April 1994 ('WTO Agreement'). *See* the following selected contributions with respect to the constitutionalization of the WTO: JOHN HOWARD JACKSON, *The World Trade Organization: Constitution and Jurisprudence*, London 1998; GAIL EVANS, *Law Making Under the Trade Constitution: A Study in Legislating by the World Trade Organization*, The Hague 2000; DEBORAH Z. CASS, *The Constitutionalization of the World Trade Organization*, Oxford 2005; JEFFREY L. DUNOFF, *The Politics of International Constitutions: The Curious Case of the World Trade Organization*, in JEFFREY L. DUNOFF AND JOEL P. TRACHTMAN, *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge 2009; CHRISTIAN JOERGES AND ERNST-ULRICH PETERSMANN, *Constitutionalism, Multilevel Trade Governance and International Economic Law*, Oxford 2011; JOEL P. TRACHTMAN, *Global commercial constitutionalization: The World Trade Organization*, in ANTHONY F. LANG AND ANTJE WIENER, *Handbook on Global Constitutionalism*, Cheltenham 2017.

[107] WTO Agreement, Preamble.

[108] *Id.*, Article II.1. The WTO comprises about 60 agreements, annexes and schedules ranging between three broad areas in relation to goods, services and intellectual property. For a comprehensive examination of the scope, history and negotiations leading to the creation of the WTO *see* AMRITA NARLIKAR, MARTIN DAUNTON, ROBERT M. STERN, *The Oxford Handbook on The World Trade Organization*, Oxford 2012.

[109] The idea that three visions of WTO constitutionalization could be identified is affirmed in these terms by DEBORAH Z. CASS, *The Constitutionalization of the World Trade Organization*, Oxford 2005, pp. 97, 145, 177. (mentioning Institutional Managerialism, Rights-Based Constitutionalization and Judicial Norm-Generation). *See also* a similar categorization by JEFFREY L. DUNOFF, *The Politics of International Constitutions: The Curious Case of the World Trade Organization*, in JEFFREY L. DUNOFF AND JOEL P. TRACHTMAN, *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge 2009, pp. 184-185.

complete institutionalization, culminating in the acquisition of an international legal personality.[110]

Still, when compared to the mature constitutional structures of States it is hard to find more than modest similarities.[111]

Thus, the Ministerial Conference is surely the most important decision-making body inside the WTO, since it may take decisions under any of the various multilateral trade agreements.[112] Further, whenever the Ministerial Conference makes amendments to such agreements, it binds all the members States, pursuant to Article XVI.4.[113] However, it is convened only every two years and includes all the representatives of the 164 States parties in the organization. In addition, there is no separate board having executive tasks; therefore, the Ministerial Conference *per se* is not in a position to effectively manage the day-by-day administration of WTO's affairs.

Conversely, the General Council, in its various guises, is engaged in several activities, ranging from quasi-legislative functions to actual judicial tasks, when it acts as the Dispute Settlement Body.[114] It also consists of all the members States of the WTO and replaces the Ministerial Conference during the intervals between its meetings, with the responsibility of administering the organization.

In such contexts, a peculiar feature of WTO bodies is that – even though the application of the rule of majority is expressly provided for by the WTO Agreement[115] –

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[110] JOHN HOWARD JACKSON, *The World Trade Organization: Constitution and Jurisprudence*, London 1998. For a discussion of the constitutional developments following the departure from the GATT system *see* GAIL EVANS, *Law Making Under the Trade Constitution: A Study in Legislating by the World Trade Organization*, The Hague 2000, pp. 26-31.

[111] JEFFREY L. DUNOFF, *The Politics of International Constitutions: The Curious Case of the World Trade Organization*, in JEFFREY L. DUNOFF AND JOEL P. TRACHTMAN, *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge 2009, pp. 185-187 (criticizing the view that the institutional architecture of the WTO has a constitutional nature.).

[112] WTO Agreement, Article IV.1. For the view that the Ministerial Conference represents the executive power in the WTO *see* GAIL EVANS, *Law Making Under the Trade Constitution: A Study in Legislating by the World Trade Organization*, The Hague 2000, pp. 31 ff.

[113] WTO Agreement, Article XVI.4 ("Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements.").

[114] *Id.*, Article IV.2-4. *See* GAIL EVANS, *Law Making Under the Trade Constitution: A Study in Legislating by the World Trade Organization*, The Hague 2000, pp. 31 ff.

[115] WTO Agreement, Article IX.1. This possibility was only taken into account in the first period after the establishment of the WTO.

they function on the basis of a consensus rule, that is to say, absent any opposition coming from any member State.[116] This feature appears to be incompatible with a process of constitutionalization, since it is built on the standard rule of consent under classic international law and implies an overwhelming obstacle to the governance of the system, particularly with respect to its law-making capacities.

While it is true that the Dispute Settlement Body is entrusted with judicial functions and may issue binding decisions upon WTO member States in contentious cases,[117] this might not be sufficient to make up for the lack of a centralized political power, as will be shown below.

Other authors focus their analysis on the impact of WTO on the protection of human rights on a global scale. The most ardent advocate of this position is Ernst-Ulrich Petersmann,[118] who, by way of illustration, affirmed that:

> Just as economic theory demonstrates the individual and social benefits of unilateral trade liberalization and deregulation, legal and democratic theory confirms that 'democratization' and 'privatization' of international guarantees of freedom of trade, for instance by means of their 'direct applicability' by domestic citizens and decentralized enforcement 'from below' by domestic courts, enhance the legal freedom and social welfare of domestic citizens. [119]

From this perspective, international economic law is simply directed at safeguarding private economic rights, which constitute the primary aim of the WTO and

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[116] For an analytical study of the consensus rule in the WTO experience *see* RICHARD H. STEINBERG, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 (2) *International Organization*, 2002, pp. 339 ff. With respect to dispute settlement, the rule works in a different way so that for example the consensus is necessary to prevent the adoption of a panel report, thus avoiding that the losing party may veto the decision. Understanding on rules and procedures governing the settlement of disputes, Annex 2 to the WTO Agreement ('Dispute Settlement Understanding'), Article 16.

[117] *Id.*, Article 2.

[118] For a recent overview of Petersmann seminal contribution to the debate on the constitutionalization of the WTO *see* TAO LI AND ZUOLI JIANG, *Human Rights, Justice, and Courts in IEL: A Critical Examination of Petersmann's Constitutionalization Theory*, 21 *Journal of International Economic Law*, 2018, pp. 193 ff.

[119] ERNST-ULRICH PETERSMANN, *From the Hobbesian International Law of Coexistence to Modern Integration Law: The WTO Dispute Settlement System - Editorial*, 1 *Journal of International Economic Law*, 1998, p. 198. *See also* extensively ERNST-ULRICH PETERSMANN, *Constitutional Functions and Constitutional Problems Of International Economic Law*, New York 1991.

the multilateral trade agreements. In fact, the worldwide liberalization of trade based on the principle of non-discrimination impinges on States' sovereignty while promoting at the same time the economic initiative.[120] WTO institutions serve merely for the purpose of making these rights enforceable at the domestic level as well as in an international forum.

Later, Petersmann developed the idea that the protection of economic rights was a necessary condition for the universal enjoyment of human rights and started arguing for a stronger commitment of the WTO in advocating human freedoms as opposed to the mere economic freedoms.[121] The principal critique to this approach is that it is far from easy to identify the exact dynamics between the right to free trade and human rights, together with other various challenges in the WTO framework.[122]

More in general, individuals' rights are enforced only indirectly in the WTO system since the Dispute Settlement Understanding does not recognize private parties' standing before the Dispute Settlement Body.[123] At the same time, domestic systems are reluctant to give direct effects to WTO rules, notwithstanding the proposals made by scholars along this line.[124] In any event, the existing WTO framework already gives human rights an important role, since they are predominantly considered as a reason to impose restrictions on trade, but their status as an exception to the ordinary regime does not mean that they are or could be the main purpose of the organization.[125]

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[120] *See* extensively *id.*

[121] *See e.g.*, ERNST-ULRICH PETERSMANN, *The WTO Constitution and Human Rights*, 3 (1) *Journal of International Economic Law*, 2000, p. 198; ERNST-ULRICH PETERSMANN, *Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society*, 19 *Leiden Journal of International Law*, 2006, pp.633 ff.

[122] ROBERT HOWSE, *Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann*, 13 (3) *European Journal of International Law*, 2002, pp. 651 ff; PHILIP ALSTON, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 (4) *European Journal of International Law*, 2002, pp. 815 ff.

[123] Dispute Settlement Understanding, Article 3.2.

[124] HÉLÈNE RUIZ FABRI, *Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?*, 25 (1) *European Journal of International Law*, 2014, pp. 151 ff.

[125] For instance, with respect to import restrictions *see* GATT, Article XX.

Lastly, but most importantly for the purposes of this work, scholars have routinely stressed the significance of the dispute settlement mechanism in the WTO, which is said to have stratified constitutional patterns in the context of international trade law.[126]

From this point of view, the starting point is the wide jurisdiction of the Dispute Settlement Body which extends to virtually any dispute between WTO Members concerning any covered trade agreement.[127] Disputes are decided on the basis of the recommendation by a Dispute Panel at first instance or by the Appellate Body, whenever a party chooses to appeal the report of a Dispute Panel.[128] The recommendation is subsequently adopted by the Dispute Settlement Body, whose decision binds the parties to the dispute. With over more than twenty years of activity, these judicial organs had the opportunity to decide a variety of disputes, both on substantial and on procedural issues.

In particular, the Appellate Body had come to acquire a central role in the interpretation of the agreements part of the multilateral trade system, recognized by the international community which regarded it as the "crown jewel" of the WTO system.[129]

Thus, for instance, it has been argued that the Appellate Body had "the ultimate authority to construe WTO law in constitutional mode" and "to draw the line between WTO law and national law."[130] In fact, as a second-instance adjudicator, it has regularly reviewed the respect of crucial WTO principles in domestic legal orders, thus exercising a form of judicial review. Indeed, most-favored nation treatment (MFN) and

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[126] *See* in particular the approach adopted by DEBORAH Z. CASS, *The Constitutionalization of the World Trade Organization*, Oxford 2005, p. 203 (recognizing, however, that the model proposed is not ultimately convincing.). Interestingly, the WTO Dispute Settlement system often comes up as a possible model in the discussion surrounding the reform of the investment arbitration system. *See* MARC BUNGENBERG AND AUGUST REINISCH, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement*, Cham 2018, p. 21. *See also* § III.1.2.

[127] Dispute Settlement Agreement, Article 1.1.

[128] *Id.*, Articles 16-17.

[129] For a discussion of the premises of the Appellate Body's historical success *see* PETER VAN DEN BOSSCHE, *From Afterthought to Centerpiece The WTO Appellate Body and its Rise to Prominence in the World Trading System*, in GIORGIO SACERDOTI ET AL., *The WTO at Ten: The Contribution of the Dispute Settlement System*, Cambridge 2006.

[130] GAIL EVANS, *Law Making Under the Trade Constitution: A Study in Legislating by the World Trade Organization*, The Hague 2000, p. 48 ff.

national treatment have been also defined "constitutional principles" of the WTO system.[131]

In this context, the Appellate Body has taken advantage of the general scope and vagueness of such principles to give them substance through its decisions, to the extent that alarmed voices were raised in relation to this sort of judicial law-making, particularly from the United States.[132]

By way of illustration, the Appellate Body put a stop to the practice of "zeroing" adopted by the EU and by the United States through a series of decisions during the first decade of the 21st century.[133]

In the context of anti-dumping measures, zeroing methodology basically consists in calculating the overall dumping margins without taking into account the occurrences in which the difference between the price practiced domestically and the price practiced abroad is negative.[134] This method of calculation is not specifically prohibited by the GATT and the related agreements on anti-dumping;[135] therefore, it was upheld by GATT panels before the establishment of the WTO.[136] Instead, the Appellate Body, affirmed that

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[131] *Id.*

[132] *See inter alia* RICHARD H. STEINBERG, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 (2) *American Journal of International Law*, 2004, pp. 247 ff. *See also* Chapter II.

[133] Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WTO Doc. WT/DS141/AB/R, dated 12 March 2001, paras. 55-59; Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, WTO Doc. WT/DS264/AB/R, dated 11 August 2004, paras. 95-96. *See also* Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology*, WTO Doc. WT/DS350/AB/R, dated 4 February 2009, para. 185.

[134] For an account of anti-dumping measures, including a detailed definition of the zeroing methodology and the way it is used in practice *see* PETROS C. MAVROIDIS, PATRICK A. MESSERLIN, JASPER M. WAUTERS, *The Law and Economics of Contingent Protection in the WTO*, Chelenham 2008, pp. 65 ff.

[135] GATT, Article VI; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, WTO Agreement ('Anti-Dumping Agreement'), Article 2.4 ("Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis.").

[136] Report of the Panel, *EC—Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP/136, dated 28 April 1995, paras. 350-354.

the method was not "fair", as required by Article 2.4 of the Anti-Dumping Agreement.[137] This line of cases polarized the debate between those holding that the Appellate Body was acting outside its competence and those that recognized a constitutional value to the interpretation given in the reports.[138]

The Appellate Body has also filled certain procedural gaps in the Dispute Settlement Understanding. Most famously, in the *Shrimp-Turtle* case it decided that panels had the authority to accept the submission of *amicus curiae* briefs prepared by NGOs or other non-state actors – even if unsolicited – relying on a broad interpretation of Article 13 of the Dispute Settlement Understanding, opposed to the stricter one advocated by the United States.[139] In this regard, Deborah Cass has argued that this judgment lends "credence to the constitutionalization claim" and is significant "from a democratic and constitutional design perspective."[140] Notably, the decision was well received by scholars because it had a positive impact on the legitimacy of the WTO

[137] Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WTO Doc. WT/DS141/AB/R, dated 12 March 2001, para 55 ("Furthermore, we are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions – such as the practice of 'zeroing' at issue in this dispute – is *not* a 'fair comparison' between export price and normal value, as required by Article 2.4 and by Article 2.4.2.") (emphasis in original).

[138] For instance, *see* ROGER P. ALFORD, *Reflections on US - Zeroing: A Study in Judicial Overreaching by the WTO Appellate Body*, 45 *Columbia Journal of Transnational Law*, 2006, p. 197 (observing that the vision beneath such decision was "one of a WTO Dispute Settlement Body that does not shy away from political controversy, that does not hesitate to articulate its own interpretation of ambiguous WTO provisions, that arrogates power from the Member States notwithstanding textual limitations on the Appellate Body's role, and that curtails the discretionary authority of executive branch agencies to exercise their delegated authority."). *Contra* SUNGJOON CHO, *Global Constitutional Lawmaking*, 31 (3) *University of Pennsylvania Journal of International Economic Law*, 2010 (making the case that "the recent WTO zeroing jurisprudence can be appreciated as a form of constitutional adjudication" with positive connotations.).

[139] Report of the Appellate Body, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R, dated 12 October 1998. The case has also deeply contributed to developing the notion of general exceptions under Article XX, whose constitutional relevance has already been mentioned. In this regard, *see* HOWARD F. CHANG, *Toward A Greener GATT: Environmental Trade Measures and The Shrimp-Turtle Case*, 74 *Southern California Law Review*, 2000, pp. 31 ff.

[140] DEBORAH Z. CASS, *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 (1) *European Journal of International Law*, 2001, p. 61.

dispute settlement mechanism, by increasing transparency through the participation of non-State entities.[141]

According to part of the scholars, however, there is a sort of "disconnect" between scholarship and WTO practice which has discouraging consequences on the alleged process of constitutionalization.[142]

At the outset, it is important to note that, pursuant to Article 3.2 of the Dispute Settlement Understanding, the Dispute Settlement Body "cannot add to or diminish the rights and obligations provided for in the covered agreements."[143] Therefore, as argued by Jeffrey Dunoff, Dispute Panels and the Appellate Body do not have the power to craft the rules of the WTO based on their own interpretations, at least according to the constitutive instrument of the organization.[144]

In any event, the degree of the impact of the Appellate Body's decisions is restrained in view of their general implementation within the system, leaving aside the issues in relation to the enforcement of specific rulings.

Limiting the analysis to the previously given examples, the findings of the Appellate Body were deeply contested not only by scholars and governments, but also by the same dispute panels. As recently as 2019, the approach of the Appellate Body with respect to zeroing was not upheld in a number of cases.[145] On the other side, briefs from

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[141] *Id.* Interestingly, the Appellate Body has also affirmed its own authority to accept unsolicited *amicus curiae* briefs. Report of the Appellate Body, *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WTO Doc. WTO/DS138/AB/R, dated 10 May 2000, para. 39.

[142] JEFFREY L. DUNOFF, *The Politics of International Constitutions: The Curious Case of the World Trade Organization*, in JEFFREY L. DUNOFF AND JOEL P. TRACHTMAN, *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge 2009, p. 190.

[143] Dispute Settlement Understanding, Article 3.2.

[144] JEFFREY L. DUNOFF, *The Politics of International Constitutions: The Curious Case of the World Trade Organization*, in JEFFREY L. DUNOFF AND JOEL P. TRACHTMAN, *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge 2009, p. 191. Strikingly, the Appellate Body ordinarily preferred a narrow and literal interpretation of the covered agreements, often based on the use of dictionary definitions; however, this does not mean that the reasoning of reports does not take into account more ambivalent concepts such as the object and purpose of the treaties. *See* GEORGES M. ABI-SAAB, *The Appellate Body and Treaty Interpretation*, in MALGOSIA FITZMAURICE ET AL. (Eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On*, Leiden and Boston 2010, p. 106.

[145] Dispute Panel Report, *United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada*, WTO Doc. WT/DS534/R, dated 9 April 2019,

amicus curiae continued to be submitted over the years, but the same Appellate Body has failed to take them into account.[146]

Crucially, scholars have criticized constitutionalization approaches based on the Appellate Body jurisprudence by mentioning the lack of jurisdiction of the Dispute Settlement Body over the conducts of WTO organs. In fact, the review exercised by the Appellate Body is limited to the internal legislation of WTO members and does not extend to their conducts inside the organization. More specifically, Jeffrey Dunoff has underlined the Appellate Body

> explicit and unequivocal rejection of the invitation to adopt a theory of separation of powers, or to articulate anything approaching a constitutional theory concerning the relationships between the WTO's political and judicial organs.[147]

Ultimately, recent developments have brought to light critical issues for the governance of the WTO, adding to the impasse in the negotiations over the necessary updates to WTO rules during the so-called Doha Round.[148]

With particular regard to judicial functions, the United States have refused to confirm or appoint new members of the Appellate Body starting from 2016, on account of systemic concerns in relation to, *inter alia*, the reach of its case-law, stretched procedural behaviors and interpretative approaches.[149] Indeed, the United States

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para. 7.106 ("Therefore, contextual considerations also support our view that the second sentence of Article 2.4.2 does not prohibit zeroing under the W-T methodology")

[146] THERESA JEANNE, *Amicus curiae briefs in the WTO DSM: Good or Bad News for Non-State Actor Involvement?*, 17 *World Trade Review*, 2017, pp. 25-26.

[147] JEFFREY L. DUNOFF, *The Politics of International Constitutions: The Curious Case of the World Trade Organization*, in JEFFREY L. DUNOFF AND JOEL P. TRACHTMAN, *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge 2009, p. 187. *See also* Appellate Body, *India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WTO Doc. WT/DS90/AB/R, dated 23 August 1999.

[148] For an overview of the failed trade negotiations during the Doha Development Round *see* ANTOINE MARTIN AND BRYAN MERCURIO, *Doha dead and buried in Nairobi: lessons for the WTO*, 16 (1) *Journal of International Trade Law and Policy*, 2017, pp.49 ff. Most importantly, the crisis of the Appellate Body has been at the center of scholarly writings in these last years. For a summary of the various proposals made in this context *see* TETYANA PAYOSOVA ET AL., *The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures*, Peterson Institute for International Economics, 2018.

[149] President Trump has also made threats to withdraw from the WTO. *See* White House Press Release, *Remarks by President Trump on American Energy and Manufacturing*, dated 13 August 2019, *available at* https://www.whitehouse.gov/ ("We will leave, if we have to."). For a deep

motivated their choice on the basis of their stark contrast with the constitutional position assumed by the organ. For instance, in a statement released in 2018, it is affirmed that:

> The United States has raised repeated concerns that appellate reports have gone far beyond the text setting out WTO rules in varied areas, such as subsidies, antidumping duties, anti-subsidy duties, standards and technical barriers to trade, and safeguards, restricting the ability of the United States to regulate in the public interest or protect U.S. workers and businesses against unfair trading practices. On procedural, systemic issues, for example, the Appellate Body has issued advisory opinions on issues not necessary to resolve a dispute, reviewed panel fact-finding despite appeals being limited to legal issues, asserted that panels must follow its reports although there is no system of precedent in the WTO, and continuously disregarded the 90-day mandatory deadline for appeals – all contrary to the WTO's agreed dispute settlement rules.[150]

Consequently, the Appellate Body has currently only one effective member and the Dispute Settlement Body is therefore unable to carry out its judicial functions.[151] Although a variety of proposals have been made by other WTO members, this crisis seems far from over. [152]

What can be drawn from the above is that the WTO system is still based on diplomatic and power-driven dynamics, without the possibility to deal with internal

assessment of the reasons behind the United States' blockage of the Appellate Body *see* JENS LEHNE, *Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?*, Berlin and Berne, 2019, pp. 29-104.

[150] Statements by the United States at the Meeting of the WTO Dispute Settlement Body, dated 27 August 2018. *See also* extensively United States Trade Representative, *Report on the Appellate Body of the World Trade Organization*, dated February 2020

[151] The Appellate Body is ordinarily composed by seven members, three of which should be appointed for every individual case. Dispute Settlement Understanding, Article 17.1. In addition, the Dispute Settlement Body may not adopt panel reports whose appeal is pending. Dispute Settlement Understanding, Article 16.4.

[152] The EU, together with other WTO member States has launched a temporary solution to overcome the problems arising from the absence of a functioning appeal mechanism. *See* Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU, Communication circulated at the request of the Delegations of Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, the European Union, Guatemala Hong Kong–China, Iceland, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Ukraine, Uruguay, WTO Doc. JOB/DSB/1/Add.12, dated 30 April 2020. For a first comment *see inter alia* ELISA BARONCINI, *Saving the Right to Appeal at the WTO: The EU and the Multi-Party Interim Appeal Arbitration Arrangement*, 22/2020 *fedaralismi.it*, 2020.

conflicts through mechanism within its legal framework.[153] Eventually, a political blockage of a single WTO member was enough to show the fragility of the system and completely undermine the "crown jewel" that was at the core of the theories surrounding its constitutionalization.[154]

2.3 The European Union Constitutional Process: The Role of the Court of Justice of the European Union

The phenomenon of EU constitutionalism stands out for its significance and impact compared with other constitutional paradigms beyond the State.[155] If anything, since a constitution – at least in a literal sense – was nearly adopted in such framework,[156] after years of debate among scholars.[157] Despite that, however, the appeal of the EU project among Global Constitutionalism's scholars far exceeds the Treaty establishing a Constitution for Europe and mostly stems from the uniqueness of the EU project

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[153] ERNST-ULRICH PETERSMANN, *Between 'Member-Driven' WTO Governance and 'Constitutional Justice': Judicial Dilemmas in GATT/WTO Dispute Settlement*, 21 *Journal of International Economic Law*, 2018, pp. 112-133 ("WTO members have, so far not challenged the procedural US violations of DSU obligations through the legal and judicial remedies offered by WTO law, thereby confirming the often criticized 'institutional imbalance' between the efficient 'WTO judiciary' and the much less efficient, political rule-making institutions of the WTO.").

[154] GREGORY SHAFFER, *A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations*, 44 *Yale Journal of International Law Online*, 2018, pp. 37 ff.

[155] The extent of the literature is so great and spread over multiple decades that it would be outside the scope of this work to take into account the manifold ramifications of the academic studies in this regard. However, *see* the following non-exhaustive list of essential works in this field: JOSEPH H. WEILER AND MARLENE WIND (Eds.), *European Constitutionalism Beyond the State*, Cambridge 2003; ARMIN VON BOGDANDY AND JÜRGEN BAST (Eds.), *Principles of European Constitutional Law*, Oxford 2010; NEIL WALKER ET AL. (Eds.), *Europe's Constitutional Mosaic*, Oxford 2011; TURKULER ISIKSEL, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State*, Oxford 2016. For an attempt to shed light on the various schools of European constitutionalism *see* GIUSEPPE MARTINICO, *The Tangled Complexity of the EU Constitutional Process: The Frustrating Knot of Europe*, New York 2012.

[156] In 2005, two referendums in France and in the Netherlands put a stop to the ratification process of the Treaty establishing a Constitution for Europe. However, the subsequent Treaty of Lisbon, albeit not having a constitutional appearance, deeply innovated the constitutional structure of the European Communities, giving rise to the current EU. For an explanation of the process that brought to the failure of the Treaty establishing a Constitution for Europe and the reasons behind the successes of the Treaty of Lisbon *see* YOURI DEVUYST, *The Constitutional and Lisbon Treaties*, in ERIK JONES ET AL. (Eds.), *The Oxford Handbook of the European Union*, Oxford 2012, pp. 163 ff.

[157] In this regard, *see* the discussion between DIETER GRIMM, *Does Europe Need a Constitution?*, 1 (3) *European Law Journal*, 1995; JÜRGEN HABERMAS, *Remarks on Dieter Grimm's 'Does Europe Need a Constitution?*, 1 (3) *European Law Journal*, 1995.

worldwide, which is said to represent a prototype for other constitutionalization processes.[158]

Not surprisingly, the EU architecture is often the primary point of reference in the analyses of other systems. For instance, Ernst-Ulrich Petersmann has been an ardent advocate of the positive contributions of the EU to the debate over constitutionalism in the international legal order, arguing at times that it constituted a model for the WTO, given its focus on the markets and economic matters.[159]

Nevertheless, regional integration at the European level is clearly something different from other global or sectoral frameworks.

In particular, notwithstanding the ever-present debate concerning the legitimacy of the EU legal order,[160] one of the peculiarities of this international organization is that it allows a certain amount of democratic representation in its institutions.[161] As argued by Jürgen Habermas, there is an underlying "dual legitimacy" in the European constitutional process.[162] On the one hand, the European Parliament directly represents the citizens of the Member States. On the other hand, the European Council represents the democratically elected Governments of the Member States, thus constituting an indirect form of representation of the peoples of Europe. In addition, after the Treaty of Lisbon, the European Parliament has gained a more prominent role in the legislative process as well as in international negotiations.[163]

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[158] NEIL WALKER, *Reframing EU Constitutionalism*, in JEFFREY L. DUNOFF AND JOEL P. TRACHTMAN, *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge 2009, pp. 149 ff.; JO SHAW, *The European Union and Global Constitutionalism*, in ANTHONY F. LANG AND ANTJE WIENER, *Handbook on Global Constitutionalism*, Cheltenham 2017, pp. 368 ff.; TAKAO SUAMI, ANNE PETERS, MATTIAS KUMM, DIMITRI VANOVERBEKE, *Global Constitutionalism from European and East Asian Perspectives*, Cambridge 2018, pp. 123 ff.

[159] ERNST-ULRICH PETERSMANN, *Theories of Justice, Human Rights, and the Constitution of International Markets*, 37 *Loyola of Los Angeles Law Review*, 2003.

[160] *See* DIETER GRIMM, *The Constitution of European Democracy*, Oxford 2017 (arguing that further integration is needed at the political level in view of the turbulent recent times.).

[161] Treaty on the European Union ('TEU'), Articles 10 and 11.

[162] JÜRGEN HABERMAS, *The Crisis of the European Union: A Response*, translated by Ciaran Cronin, Cambridge and Malden 2012 ("Once we come to *see* the European Union as if it had been created for good reasons by two constitution-founding subjects endowed with equal rights – namely, co-originally by the citizens (!) and the peoples (!) of Europe – the architecture of the supranational but nevertheless democratic political community becomes comprehensible.")

[163] TEU, Articles 14 and 48.

Therefore, European constitutionalism is certainly less exposed to the criticism over the legitimacy of Global Constitutionalism's theories. Still, the democratic deficit of EU institutions, exacerbated by the rise of populist movements and the major setback symbolized by the exit of the United Kingdom, remains a major topic of discussion among scholars.[164]

In this context, while there might be a mixed reception in relation to the other institutions of the European Union, all the authors dealing with European constitutionalism generally agree on the central role of the Court of Justice of the European Union ('CJEU') in this process. As Dieter Grimm puts it, "it was the Court that fuelled the integration process judicially when it stagnated politically."[165]

As a matter of fact, the Court has been the main driver of the EU constitutionalization process, whose major leaps forward were triggered by its creative and often unexpected interpretations rather than by the mere intergovernmental cooperation through the signing of new treaties.

In its internal dimension, this process has been exemplified *inter alia* by the doctrines of primacy and direct effect, which ensured the application of EU law in the relationships between Member States and their citizens.

When establishing such principles, the CJEU also took the opportunity of explaining how the treaties should be understood from the standpoint of international law, with constitutional repercussions on the European system immediately and clearly perceived by the academic community.[166] Thus, in *Van Gend en Loss* it affirmed that the then European Economic Community:

> constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.[167]

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[164] SANDRA KRÖGER, *Political Representation in the European Union: Still Democratic in Times of Crisis*?, New York 2014.
[165] DIETER GRIMM, *The Constitution of European Democracy*, Oxford 2017, p. 4.
[166] *See e.g.*, ERIC STEIN, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 *American Journal of International Law*, 1981, pp. 1 ff.
[167] CJEU, Case C-26/62, *Van Gend en Loos v Administratie der Belastingen*, Judgment, dated 5 February 1963, para. 12. For an insightful history of this case *see* MORTEN RASMUSSEN, *Revolutionizing European law: A history of the* Van Gend en Loos *judgment*, 12 (1) *International*

In light of this characteristic spirit – which did not find an express legal basis in the founding treaties – the EU has become an autonomous legal order where individuals and their rights are not contingent elements but an essential aspect of the governance.[168]

Only a year later, in *Costa v. Enel* the Court clarified an aspect that was previously left unresolved. Based on a systemic interpretation of the obligations assumed by the Member States, the CJEU held that:

> the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.[169]

Not only EU law has a direct effect, but it has the capacity to resist subsequent changes operated by the Member States through their legislative, executive and judicial bodies. Without creating an actual hierarchy between different norms, the Court had therefore established the primacy of the supranational regime over the national ones.[170]

The Court also affirmed that the constitutional nature of the EU legal order entailed the necessity of a judicial review over the conducts of EU institutions, together with those of individual Member States. In *Les Verts v. European Parliament* it affirmed that:

> the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the

Journal of Constitutional Law, 2014, pp. 136 ff. (taking the view that *Van Gend en Loos* represents a "genuine revolution" in European law, because it was based on a new constitutional understanding of the treaties.).

[168] For a critical assessment of the implementation in practice of the ideals enshrined in the decision *see* DAMIAN CHALMERS AND LUIS BARROSO, *What Van Gend en Loos stands for*, 12 (1) *International Journal of Constitutional Law*, 2014, pp. 105 ff.

[169] CJEU, Case C-6/64, *Flaminio Costa v E.N.E.L.*, Judgment, dated 15 July 1964, p. 594. For a detailed account of the background of this case *see* the recent contribution by AMEDEO ARENA, *From an Unpaid Electricity Bill to the Primacy of EU Law: Gian Galeazzo Stendardi and the Making of* Costa v. ENEL, 30 (3) *European Journal of International Law*, 2019, pp. 1017 ff.

[170] For a general overview of the primacy principle *see* MONICA CLAES, *The Primacy of EU Law in European and National Law*, in ERIK JONES ET AL. (Eds.), *The Oxford Handbook of the European Union*, Oxford 2012, pp. 178 ff.

> measures adopted by them are in conformity with the basic constitutional charter, the Treaty.[171]

Within this framework, an outstanding contribution has come from all the national courts and tribunals comprising the EU judicial system and enforcing EU rules in practice.[172]As stated recently by the same CJEU:

> The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law. . . . It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection.[173]

This does not mean that the relationship between national courts and the CJEU has generally been problem-free. On the contrary, the conflicts with national constitutional courts have marked the history of the constitutionalization process in Europe.[174] Quite recently, for instance, the *Taricco* saga has inflamed the debate over the national constitutional limitations to the EU integration process.[175] However, the judicial dialogue has a collaborative aim, confirming the decentralized nature of the EU constitutional model.

Bearing all of this in mind, it can be said that the pervasive influence of the CJEU has been undoubtedly directed towards the protection of fundamental rights of the

[171] CJEU, Case C-294/83, *Parti écologiste "Les Verts" v European Parliament*, Judgment, dated 23 April 1986, para. 23.
[172] ANNE-MARIE SLAUGHTER, ALEC STONE SWEET AND JOSEPH H. WEILER, *The European Court and National Courts-Doctrine and Jurisprudence: Legal Change in Its Social Context*, Oxford 1998.
[173] CJEU, case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, Judgment, dated 28 February 2018, paras. 36-37. In this context, the key role of the preliminary reference mechanism provided for by Article 267 of Treaty on the Functioning of the European Union ('TFEU') will be also addressed in § III.2.2.
[174] GIUSEPPE MARTINICO, *The "Polemical" Spirit of European Constitutional Law: On the Importance of Conflicts in EU Law*, 16 (6) *German Law Journal*, 2019, pp. 1344 ff.
[175] For a comparative analysis of the limits to the primacy effects of EU law *see* DAVIDE PARIS, *Limiting the 'Counter-limits': National constitutional courts and the scope of the Primacy of EU Law*, 10 (2) *Italian Public Law Journal*, 2018, pp. 205 ff.

European citizens and the internal balance between its institutions, taking also into account the national perspective.[176]

In parallel, with respect to the external dimension of the EU action, the role of the CJEU has been reflected mainly by rulings that have clarified the position of the Union in international affairs, in light of the principle of autonomy and the need to guarantee judicial review of the conducts of EU institution.[177]

The *Kadi* saga certainly represented one of the most significant developments in this context.[178]

As already mentioned,[179] the CJEU was charged with the task of establishing the compatibility of the regulation implementing the UN sanctions regime in the EU with fundamental principles of EU law.[180] Departing from the approach of the Court of First Instance the CJEU ruled that

> the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty.[181]

In other terms, the Court took the view, subsequently confirmed,[182] that a restriction to fundamental human rights cannot be justified in and of itself by making

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[176] For the opportunity to apply the traditional tripartion of powers to the EU *see* GERARD CONWAY, *Recovering a Separation of Powers in the European Union*, 17 (3) *European Law Journal*, 2011, pp. 304 ff.

[177] *See also* § III.2.

[178] For an impeccable summary of this saga, written by the Vice President of the CJEU *see* KOEN LENAERTS, *The Kadi Saga and the Rule of Law within the EU*, 67 (4) *SMU Law Review*, 2014, pp. 707 ff. The literature stressing the significance of these decisions from a perspective of several fields of study, ranging from public international law, EU law and constitutional law, is very wide. *See* the attempt of making order in the contributions written above the first decision by SARA POLI AND MARIA TZANOU, *The Kadi Rulings: A Survey of the Literature*, 28 (1) *Yearbook of European Law*, 2009, pp. 533 ff.

[179] *See* § I.2.1.

[180] The Court clarified at many times that it did not have the power to review the sanctions regime *per se*, since it was part of a different legal order. CJEU, Grand Chamber, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, Judgment, dated 3 September 2008, para. 286.

[181] *Id.*, para. 285.

[182] CJEU, Grand Chamber, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others v Yassin Abdullah Kadi*, Judgment, dated 18 July 2013.

reference to international peace and security, because judicial review is a non-negotiable aspect of EU law.

Again, in the Opinion on the accession of the EU to the ECHR the Court held that the draft Treaty negotiated for that purpose was not compatible with EU law, notwithstanding the specific steps taken in that direction with the amendments made to the EU founding treaties. The Court motivated its decision on account of the fact that

> the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation.[183]

Significantly, as can be seen from the above-mentioned decisions, the CJEU often uses a language reminiscent of the constitutional nature of the treaties, thus contributing to an interpretation through constitutional categories. Such language allows the Court to differentiate EU law from international law in general, preventing other legal orders from gaining too much relevance.

In conclusion, there are limited doubts with respect to the constitutional nature of the EU legal order and the fundamental role assumed by the CJEU in this regard. Nonetheless, its relevance in the context of Global Constitutionalism is heavily questionable from at least two points of view.[184]

First, it goes without saying that the level of integration between European countries – the result of a unique combination of events – would not be easily replicable in other circumstances and it has already shown a certain distress with the progressive enlargement of the EU. In particular, the exit of the United Kingdom may trigger a further backlash against EU institutions.

[183] CJEU, Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, dated 18 December 2014, para. 158. For a critical assessment of the risk-averse approach of this decision *see* ADAM LAZOWSKI AND RAMSES A. WESSEL, *When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR*, 16 *German Law Journal*, 2015, pp. 179 ff.

[184] TAKAO SUAMI, ANNE PETERS, MATTIAS KUMM, DIMITRI VANOVERBEKE, *Global Constitutionalism from European and East Asian Perspectives*, Cambridge 2018, pp. 123 ff.

Second, it would be blatantly Eurocentric to apply globally European schemes and patterns and disregard other legal traditions and cultures, which may similarly contribute to the discussion over Global Constitutionalism.[185]

The real merit of the EU was proposing a way forward to adopt constitutional mechanisms and values beyond the State, but this does not mean that the EU model can be transposed as such outside the European borders.

[185] *See e.g.*, TOM GINSBURG, *Constitutionalism: East Asian Antecedents*, 88(1) *Chicago-Kent Law Review*, 2012.

3. Normative Analysis of Potential Constitutional Developments

3.1 Compensatory Constitutionalism: How to Preserve the Achievements of Constitutionalism

The Westphalian sovereignty paradigm rested on the idea that each State had exclusive authority over its territory, with the underlying assumption that States were the ultimate subjects of international law.[186] A system of inter-State relations based on certain "rituals" applied to peace and war – with the establishment of permanent diplomacies and the gradual crystallization of *ius ad bellum* and *ius in bello* – could only exist in a framework where the independence of its participants was assured.[187]

The integrity of a State in the community to which it took part had the additional function of preventing interferences in that State's domestic affairs.[188] Conversely, from this perspective, the sovereignty of States had been progressively limited thanks to the struggles of internal political and philosophical movements culminating in the French and American revolutions, whose principles are still at the heart of modern constitutionalism.[189] Crucially, the main object of State's concerns internally were individuals, as primary holders of rights and freedoms.

In substance, it can be maintained that the "two bodies of law—constitutional law as internal law and international law as external law—could thus exist independently of one another."[190]

Globalization has had enormous repercussions on the centrality of States in the international legal order. As already pointed out, the increasing involvement of

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[186] *See e.g.* VINCENZO CANNIZZARO, *Diritto Internazionale*, Torino 2016, p. 273. For the interesting view that the Peace of Westphalia constitutes an "aetiological myth" and was only a single "instance where distinct separate polities pursued their continuing quest for more authority over their territory through greater autonomy" *see* STEPHANE BEAULAC, , *The Westphalian Model in Defining International Law: Challenging the Myth*, 8 *Australian Journal of Legal History*, 2004, pp. 181 ff.

[187] *See* extensively HEINZ DUCHHARDT, *From the Peace of Westphalia to the Congress of Vienna*, in ANNE PETERS AND BARDO FASSBANDER (Eds.), *The Oxford Handbook of the History of International Law*, Oxford 2012, pp. 628 ff.

[188] This principle is solemnly affirmed by the UN Charter, Article 2 (7).

[189] DIETER GRIMM, *The Achievement of Constitutionalism*, in PETRA DOBNER AND MARTIN LOUGHLIN, *The Twilight of Constitutionalism?*, Oxford 2010, p. 3.

[190] *Id.*, p. 13.

supranational institutions and private subjects has – to a certain extent – eroded the authority of States when compared to the absolute primacy of their sovereignty at the base of the traditional Westphalian order, both in the national and the international realm.[191]

In this context, it has been claimed that the traditional values of constitutionalism are seriously at risk in light of the decline of the Nation-State. To put it in the words of Anne Peters:

> Overall, state constitutions are no longer 'total constitutions'. In consequence, we should ask for compensatory constitutionalization on the international plane. Only the various levels of governance, taken together, can provide full constitutional protection[192]

In short, the main thesis of compensatory constitutionalism is that de-constitutionalization at the domestic level might find a solution through the constitutionalization of international law, on the premise that the transfer of functions and the intertwinement between the international and national legal orders have an impact on the effectiveness of well-established constitutional constraints.[193]

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[191] These phenomena were already outlined in § I.1. See, with special regard to the theory analyzed in this section, ANNE PETERS, *Le Constitutionnalisme Global : Crise ou Consolidation?*, 19 *Jus Politicum*, 2018 (underlining that "*certaines fonctions autrefois typiquement gouvernementales, telles que la garantie de la sécurité, de la liberté et de l'égalité, sont aujourd'hui transférées, du moins en partie, à des niveaux « supérieurs ».*" and that "*des ONG veillent par leurs enquêtes et leur activité judiciaire au respect des normes internationales, des droits de l'Homme et de l'environnement ; des agences de notation influencent le marché financier ; des fondations philanthropiques – comme la fondation Bill and Melinda Gates – sont les acteurs les plus puissants dans la gouvernance mondiale de la santé ; des entreprises militaires mènent des opérations de paix ; des procédures d'arbitrage règlent des litiges concernant des investissements et ont donc une influence sur les politiques sociales et environnementales des pays*.")

[192] ANNE PETERS, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 *Leiden Journal of International Law*, 2006, p. 580.

[193] For a similar finding, *see* the idea of "supplementary constitutionalism" in JEFFREY L. DUNOFF AND JOEL P. TRACHTMAN, *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge 2009; *See also* INGOLF PERNICE, *The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalisation*, PIERRE-MARIE DUPUY ET AL. (Eds.), *Common Values in International Law: Essays in Honour of Christian Tomuschat*, Kehel, Strasbourg and Arlington, 2006 (drawing insights from the European experience); CHRISTIAN WALTER, *International Law in a Process of Constitutionalization*, in ANDRÉ NOLLKAEMPER AND JANNE E. NIJMAN, *New Perspectives on the Divide Between National and International Law*, 2007, p. 215.

As an even more basic assumption, this theory considers that the achievements of constitutionalism at the national level deserve and need to be preserved also on the international plane. This means that the principle of rule of law, the idea of the separation of powers, the protection of fundamental human rights and democracy should and can be safeguarded irrespective of the scope of the legal order considered.[194]

However, contrary to the opinions of other scholars previously analyzed, Anne Peters believes that it is still too early to say that there is an international constitution capable of defending these values, primarily because there is no constitution in the formal sense nor an elaborate system of hierarchy.[195] Instead, there are already examples of fragmentary constitutional law elements encompassing various sectors at different levels, starting from the fields of human rights and trade law.[196] Such elements arise in connection with the constitutional functions exercised and through the pressure for the application of constitutional values on the international plane. They form, in the opinion of Anne Peters, "constitutional networks."[197]

The notion of compensatory constitutionalism can be clarified through a few examples given by the same author.

In a recent analysis of the Swiss Constitution, [198] it was underlined that the Federal Tribunal is bound to apply federal law to the extent that it cannot exercise judicial review and decide whether it respects constitutional principles.[199] Instead, the Federal Tribunal has affirmed that it can adjudge the compatibility of federal law with international law – with special emphasis on obligations arising under the European Convention on Human Rights (ECHR) – pursuant to an interpretation of the Constitution that entails the primacy

[194] ANNE PETERS, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 *Leiden Journal of International Law*, 2006, p. 583.
[195] *Id.*, p. 599.
[196] *Id.*, p. 601.
[197] *Id.*, p. 601.
[198] RAFFAELA KUNZ AND ANNE PETERS, *Constitutionalisation and Democratisation of Foreign Affairs: The Case of Switzerland*, in ANNELI ALBI AND SAMO BARDUTZKY (Eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law: National Reports*, The Hague 2019.
[199] Swiss Federal Constitution, Article 190 reads: "*Le Tribunal fédéral et les autres autorités sont tenus d'appliquer les lois fédérales et le droit international*." Therefore, there is no space to affirm its right to sanction the invalidity of federal laws on the basis of the contrast with the Constitution.

of international law.[200] According to Anne Peters, this is a perfect example of compensatory constitutionalism because:

> International law in practice thus compensates for the lack of a mechanism of constitutional review, which is in this sense introduced 'through the backdoor.'[201]

Within the same analysis, [202] an illustration was also offered of the opposite phenomenon, concerning a circumstance in which Swiss Courts refused to assume a compensatory role to balance a constitutional flaw arising in international law.[203]

It has already been pointed out that the UN system lacks a judicial review mechanism when it comes to individuals targeted by economic sanctions for the purpose of the fight against terrorism.[204] Switzerland's Federal Tribunal, albeit conscious of this structural flaw, denied the possibility of a substantive examination concerning the respect of fundamental human rights enshrined in the Swiss Constitution and in international law mainly on two grounds. First, the previously mentioned interpretation with respect to the primacy of international law under the Swiss Constitution prevented it to assess whether

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[200] *See e.g.*, Switzerland's Federal Tribunal, Judgment, DTF 136 II 241, dated 26 January 2010, para. 16 ("*Aux termes de l'art. 190 Cst., ni le Tribunal fédéral ni aucune autre autorité ne peuvent refuser d'appliquer une loi fédérale ou le droit international. Ni l'art. 190 Cst. ni l'art. 5 al. 3 Cst. n'instaurent de rang hiérarchique entre les normes de droit international et celles de droit interne. Lorsqu'une contradiction insurmontable entre les deux ordres juridiques est constatée, le Tribunal fédéral s'en tient à sa jurisprudence, selon laquelle le droit international public l'emporte en principe sur le droit interne, spécialement lorsque la norme internationale a pour objet la protection des droits de l'homme, mais également en dehors de toute question de protection des droits de l'homme, de sorte qu'une disposition légale de droit interne contraire ne peut trouver d'application.*") (internal citations omitted).

[201] RAFFAELA KUNZ AND ANNE PETERS, *Constitutionalisation and Democratisation of Foreign Affairs: The Case of Switzerland,* in ANNELI ALBI AND SAMO BARDUTZKY (Eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law: National Reports*, The Hague 2019, p. 1493.

[202] *Id.*, pp. 1513 ff.

[203] For a detailed analysis of the *Nada* case *see* among the others YANNICK WEBER, *United Nations Security Council Resolutions and the European Court of Human Rights: Conflict or Systemic Integration? A Case Study of Switzerland*, 30 *Hague Yearbook of International Law*, 2017, pp. 131 ff.; ERIKA DE WET, *From Kadi To Nada: Judicial Techniques Favoring Human Rights Over United Nations Security Council Sanctions*, 12 *Chinese Journal of International Law*, 2013; CHRISTINA ECKES AND STEPHAN HOLLENBERG, *Reconciling Different Legal Spheres in Theory and Practice: Pluralism and Constitutionalism in the Cases of Al Jedda, Ahmed and Nada*, 20 (2) *Maastricht Journal of European and Comparative Law*, 2013, pp. 218 ff.

[204] *See* § I.2.1.

the regime respected internal provisions.[205] Secondly, pursuant to Article 103 of the UN Charter, human rights' obligations originating under general international law were considered hierarchically inferior when compared to the UN Charter and related sources.[206]

Charged with the task of assessing the legitimacy of this judgment under the Convention, the European Court of Human Rights ('ECtHR') attempted to give an interpretation that substantially put aside the question of a potential contrast between human rights and the resolutions of the Security Council.[207] In fact, the Court held that, absent a specific assertion on that regard, the sanction regime established by an organ of the UN could not require States to violate fundamental human rights.[208] Therefore, it was necessary to exercise full judicial review with respect to the measures taken in accordance with the UN resolutions.[209]

In this case, drawing on the insights of compensatory constitutionalism, it could be affirmed that the ECHR, as part of the legal framework applicable to the dispute, had to make up for the lacks in the UN system as well as for the reluctancy with which Swiss

[205] Switzerland's Federal Tribunal, *Nada Youssef v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs*, Judgment, BGE 133 II 450, dated 14 November 2007, paras. 3-6.
[206] *Id.*, para. 7. *See* § I.2.1.
[207] ECtHR, Grand Chamber, *Nada v. Switzerland*, Application no. 10593/08, Judgment, dated 12 September 2012, para. 197 ("That finding dispenses the Court from determining the question, raised by the respondent and intervening Governments, of the hierarchy between the obligations of the States Parties to the Convention under that instrument, on the one hand, and those arising from the United Nations Charter, on the other. In the Court's view, the important point is that the respondent Government have failed to show that they attempted, as far as possible, to harmonise the obligations that they regarded as divergent.")
[208] *Id.*, paras. 175-180.
[209] This approach was later confirmed in ECtHR, Grand Chamber, *Al-Dulimi And Montana Management Inc. V. Switzerland*, Application no. 5809/08, Judgment, dated 21 June 2016 ("Accordingly, where a Security Council resolution does not contain any clear or explicit wording excluding or limiting respect for human rights in the context of the implementation of sanctions against individuals or entities at national level, the Court must always presume that those measures are compatible with the Convention. In other words, in such cases, in a spirit of systemic harmonisation, it will in principle conclude that there is no conflict of obligations capable of engaging the primacy rule in Article 103 of the UN Charter."). *See* YANNICK WEBER, *United Nations Security Council Resolutions and the European Court of Human Rights: Conflict or Systemic Integration? A Case Study of Switzerland*, 30 *Hague Yearbook of International Law*, 2017, pp. 135 ff.

Courts dealt with this affair, by urging the respect of fundamental constitutional values. As affirmed in the conclusion of the analysis:

> The ECtHR, in compelling Switzerland to exercise such review, might in the end work more in favour of compensatory constitutionalism through the pressure it creates (deployed through an ECHR member state) to reform the UN sanctions system.

Ultimately, these examples clarify that, as argued by other commentators,[210] compensatory constitutionalism would mostly stem from the actions of judges, at whatever level they operate. In the words of Anne Peters, "the constitutionalization of international law has been court-driven."[211]

In the absence of a formal constitution from which political power flows and a consistent hierarchy of norms on which the system can rely, tribunals and courts still remain the main channel through which international law might compensate constitutional shortcomings in the domestic sphere.

3.2 Global Societal Constitutionalism: How to Enforce the Obligations of Multinational Enterprises

The wide scope and ideal objectives of Global Constitutionalism often require a multidisciplinary approach.[212] Therefore, it is not surprising that philosophers, political scientists and legal sociologists have manifested a strong interest towards the revolution caused by globalization, proposing far-reaching analyses even through the lenses of constitutionalism. Remarkably, their contributions often evidence a perception which is radically divergent from that of positive legal scholars.

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[210] AOIFE O'DONOGHUE, *Constitutionalism in Global Constitutionalisation*, Cambridge 2014, p. 174.
[211] ANNE PETERS, *The Merits of Global Constitutionalism*, 16 (2) *Indiana Journal of Global Studies*, 2009, p. 408.
[212] ANNE PETERS AND KLAUS ARMINGEON, *Introduction: Global Constitutionalism from an Interdisciplinary Perspective*, 16(2) *Indiana Journal of Global Legal Studies*, 2009, pp. 385 ff.

Of particular relevance is the attempt by Gunther Teubner[213] – together with other scholars[214] – to discuss the idea of societal constitutionalism in the global realm.

The starting point of this sociological approach is that the polity to which Nation-States refer is not the only autonomous order of this nature and that many other subdivisions exist within the same Nation-States, even leaving aside the changes brought by globalization.[215] Through the ages, different forms of State have dealt with these social orders in different ways, but according to Teubner this does not change the fundamental question, formulated by the author in the following terms:

> Since the time of its nation-state beginnings, constitutionalism has been faced with the unresolved question of whether and how the constitution should also govern non-state areas of society. Are the economic, scientific, educational, medical, and other social activities to be subjected to the normative parameters of the state constitution? Or should social institutions develop their own constitutions autonomously?[216]

The answer given by societal constitutionalism's advocates, borrowing from Grotius, is that *ubi societas ibi constitutio*.[217]

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[213] *See* the following relevant contributions of the German sociologist and legal scholar GUNTHER TEUBNER, *Constitutional Fragments: Societal Constitutionalism and Globalization*, Oxford 2010; GUNTHER TEUBNER, *The Project of Constitutional Sociology: Irritating Nation State*, 4 *Transnational Legal Theory*, 2013, pp. 44 ff.; GUNTHER TEUBNER, *The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors*, 69 *Modern Law Review*, 2006, pp. 327 ff.; GUNTHER TEUBNER, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?*, in CHRISTIAN JOERGES ET AL. (Eds.), *Transnational Governance and Constitutionalism*, Portland 2004.

[214] Among the others *see* CHRIS THORNHILL, *A Sociology of Transnational Constitutions: Social Foundations of the Post-National Legal Structure*, Cambridge 2016; JEAN-PHILIPPE ROBÉ ET AL. (eds.), *Multinationals and the Constitutionalization of the World Power System*, New York 2016; POUL F. KJAER, *Constitutionalism in the Global Realm: A Sociological Approach*, New York 2014. Societal constitutionalism is indebted to the systems theory elaborated by Niklas Luhmann and David Sciulli as well as to Jacques Derrida's philosophical thought, whose roles cannot be discussed here.

[215] GUNTHER TEUBNER, *Constitutional Fragments: Societal Constitutionalism and Globalization*, Oxford 2010, pp. 15-41. *See also* SUSAN MARKS, *State-Centrism, International Law, and the Anxieties of Influence*, 19 *Leiden Journal of International Law*, 2006, pp. 339 ff. (with remarks over the limits of a State-centered approach in international legal writing.).

[216] GUNTHER TEUBNER, *Constitutional Fragments: Societal Constitutionalism and Globalization*, Oxford 2010, p. 5.

[217] *Id.*, p. 35. Obviously, constitutional scholars cannot accept such a large extent of the concept of "constitution." See, among the others, the critical remarks of RAINER WAHL, *In Defence of 'Constitution'*, in PETRA DOBNER AND MARTIN LOUGHLIN, *The Twilight of Constitutionalism?*,

Consequently, from this perspective, there are as many constitutions as social subsystems and States' constitutions merely provide a general framework, which might favor or limit the development of the other regimes. In this regard, societal constitutionalism advocates for the cooperation of the State with these social forces.[218]

Yet, according to Gunther Teubner, the State is no more able to perform this function as a consequence of globalization because the classic instruments of its centralized power have lost effectiveness outside its territoriality.[219]

Conversely, the distinct social orders are still not capable of acting collectively through their civic constitutions to wholly replace States and serve as a point of reference for society. At most, what the world is moving towards are mere "constitutional fragments" that will progressively pervade the various social sub-areas. The conclusion drawn by Gunther Teubner is that:

> if constitutionalism can be applied only to the fragments of global society, then the unitary global constitution must be abandoned and attention concentrated instead on the fundamental conflicts between these fragments. In this case an all-embracing constitutional law will be able to function—if at all—not as a unitary law, but simply as a global 'constitutional conflict of laws.'[220]

In other words, societal constitutionalism does not believe or advocate for the existence of a global constitution. Conversely, it starts from the assumption that constitutionalization occurs within society rather than representing a shift of the global system into something else. Hence, the social subdivisions are independently developing constitutional features and a substantial problem might arise in the coordination of these systems worldwide.[221]

Oxford 2010, pp. 220 ff. (arguing that the extension of the concept of constitution is adopted as a strategy to exploit the "noble aura" of the term).

[218] GUNTHER TEUBNER, *Constitutional Fragments: Societal Constitutionalism and Globalization*, Oxford 2010, pp. 38-41.

[219] *Id.*, pp. 43 ff.

[220] *Id.*, p. 13.

[221] While the starting points in the two perspectives clearly differ, the outcome of this analysis is similar to the various academic discourses on the fragmentation of the international legal order. *See* § II.2.1.

Against this background, hierarchical relationships become unrealistic and the best prospect would be an heterarchical framework, where each network is connected and at the same time autonomous and independent.

The most prominent example of this progress supposedly concerns the so-called global economic constitution, founded on transnational private entities that constitute the main object of and are at the same time the creators of this new constitutional order.[222]

From this point of view, Gunther Teubner refers to the current tension between hard law – established by the State and related entities – and soft law – ensuing from internal processes. While transnational codes of conduct are not ordinarily legally enforceable, being a typical example of the latter category, multinational enterprises would allegedly feel the need to respect them. Conversely, solemnly declared guidelines of international institutions, which can be ascribed to the former category, do not bind the relevant parties of the organization, which are basically free to adhere to them.

Precisely on account of this blurred line between legal and moral obligations, a particularly sensitive issue concerns the respect of fundamental human rights by new powerful actors.

At first, societal constitutionalism argues the applicability of human rights in transnational regimes in light of their universal scope. Rather than emerging from the extraterritorial effects of national constitutions, however, the validity of this statement is assumed on the basis of the judicial practice in regime-specific institutions. More exactly, the decisions of judicial bodies, such as WTO panels and arbitration tribunals in the investment law system, could positivize human rights standards and originate a "common law constitution" in the transnational sphere.[223]

Yet, there remains the problem of explaining how these standards can bind not only States – the traditional forms of political organization responsible for their respect towards the entire society – but also the growing private transnational sector made up by

[222] *See* extensively ALEC STONE SWEET, *The new Lex Mercatoria and transnational governance*, 13 (5) *Journal of European Public Policy*, 2006. Next to the developments of the *lex mercatoria*, another legal regime that is often mentioned in this regard is the *lex digitalis* of the Internet.
[223] GUNTHER TEUBNER, *Constitutional Fragments: Societal Constitutionalism and Globalization*, Oxford 2010, p. 130. At the same time, a critical issue of this approach lies in the very fragmented nature of the investment system, which arguably prevents any positivization of rules, as further elaborated in § III.1.3.

multinational enterprises. The issue of the "horizontal effects" of fundamental rights is all the more urgent because of the extraordinary breadth and magnitude of their impact in many areas of life.[224]

In practice, the idea of subjecting multinational enterprises to the same human rights standards that are binding upon States is certainly a major challenge arising from globalization. However, such issue does not seem to be adequately addressed in the field of international economic law, which is mainly focused on the interests of business actors, rather than on their corresponding obligations.[225]

From the perspective of Gunther Teubner, while private law and tort already disciplines individual and specific violations to the human integrity, the next step would be to address the anonymous matrices which constitute the real threat in today fragmented and globalized world. Nevertheless, the justiciability of the structural endangerment caused by transnational private organizations is a cumbersome function to achieve. In the absence of a conceivable alternative mechanism, according to Teubner, "the conflict with institutional problems that is really meant has to take place within individual forms of action."[226]

In any event, although theoretically dissociated from dogmatic legal characterizations, societal constitutionalism does not ignore that the key instrument to achieve its objectives is still represented by the exercise of judicial functions. Whether the obligation to respect human rights will be recognized upon private actors depends on what the courts and tribunals established within the international economic order will eventually assess.

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[224] GUNTHER TEUBNER, *The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors*, 69 *Modern Law Review*, 2006, p. 328 (discussing the role of pharmaceutical enterprises during the AIDS epidemic and listing several "scandals" in which transnational corporations were allegedly involved.).

[225] *See* further insights in § III.1.2.

[226] GUNTHER TEUBNER, *Constitutional Fragments: Societal Constitutionalism and Globalization*, Oxford 2010, pp. 146-149.

4. Conclusion

The survey carried out in this chapter has shown the fundamental role that the exercise of judicial functions plays in Global Constitutionalism's theories.

On the one hand, within international organizations, the scope of the respective judicial branches marks the success or entails the failure of the so-called constitutionalization processes.

The Court of Justice of the European Union is the main example of this aspect, since, through its caselaw, it allowed the EU project to reach a whole new frontier of integration, characterized by constitutional values – such as the respect of fundamental human rights – and mechanisms – such as the outstanding judicial review of EU acts, having effects even beyond the borders of Europe. The Appellate Body, the "crown jewel" in the WTO, had the prospective opportunity to trigger a constitutional evolution in the international economic field. Eventually, however, the political blockage inside the Dispute Settlement Body prompted a setback of the entire system. Finally, the project of a universal constitution enshrined in the UN Charter finds an overwhelming limit exactly in certain *lacunae* of the International Court of Justice.

On the other hand, judicial activism seems to represent the main driver of compensatory and societal constitutionalism, which make different proposals on how to deal with the problems of globalization.

As indicated in the first section, the purpose of this chapter was not to demonstrate the rightfulness of a particular strand of Global Constitutionalism nor to determine the goodness of this discourse in general.

In this regard, although criticism arises from exponents of various disciplines ranging from constitutional to public international law,[227] it is evident that the appeal of

[227] For a general overview of the main critiques towards the Global Constitutionalism project see ANNE PETERS, *The Merits of Global Constitutionalism*, 16 (2) *Indiana Journal of Global Legal Studies*, 2009, pp. 400-403. *See also* in addition to the contributions mentioned in relation to the specific theories CHRISTIAN VOLK, *Why Global Constitutionalism Does not Live up to its Promises*, 4 *Goettingen Journal of International Law*, 2012, pp. 551 ff.; CARLO FOCARELLI, *Costituzionalismo internazionale e costituzionalizzazione della global governance: alla ricerca del diritto globale*, 2 *Politica del Diritto*, 2011; ERNEST A. YOUNG, *The Troubles with Global Constitutionalism*, 38 *Texas International Law Journal*, 2003, pp. 528 ff.

Global Constitutionalism flows from the inherent benefits of this debate, leaving aside the issue of the approach pursued.[228] If the positive analysis of the constitutional features beyond the State conveys a better understanding of the governance structures of the relevant systems scrutinized, normative theories are a crucial tool to address the ever-intensifying challenges of globalization.

However, there is a risk to transform constitutionalism in a Procrustean bed and force heterogenous systems into categories that cannot belong to the globalized realm.[229] A constitution of the international legal order in the traditional domestic notion is not realistic and admittedly not even desirable, primarily in light of the democratic deficit and the various legitimacy issue of international institutions.[230]

As a useful prism, instead, Global Constitutionalism brings to light a visible evolution, with uncertain outcomes but with the potential of refining and enriching the study of global interconnectedness.[231]

This chapter has already shown the difficulties arising for decision-making bodies in the international arena, intensified by the lack of political power, and the greater flexibility enjoyed in applying general principles in practice, in the absence of specific rules.

The next chapter will further describe how the proliferation of adjudicating bodies is connected with a growing fragmentation of the international legal order, with a focus

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[228] CHRISTINE E.G. SCHWÖBEL, *The Appeal of the Project of Global Constitutionalism to Public International Lawyers*, 13 (1) *German Law Journal*, 2011, p. 15 (stating that "Global constitutionalism offers the perfect solution: it is flexible enough to take politics and economics into account, and at the same time provides ground for a strong normative framework. The appeal of a strong regulating framework that at the same time is realistic enough to take other (non-normative) forces into account is overwhelming.")

[229] The expression "Procrustean bed" was used in this context by BRUNO SIMMA, *Universality of International Law from the Perspective of a Practitioner*, 20 (2) *European Journal of International Law*, 2009, p. 297. In the Greek mythology, Procrustes was a bandit who attracted travelers in its home and forced them to sleep in an iron bed. In order for them to precisely fit the bed, Procrustes stretched them or cut off the legs, thus provoking their deaths.

[230] *See* extensively CLAUDIO CORRADETTI AND GIOVANNI SARTOR (Eds.), *Global Constitutionalism without Global Democracy (?)*, European University Working Papers 2016/21, 2016.

[231] MICHEL ROSENFELD, *Is Global Constitutionalism Meaningful or Desirable?*, 25 (1) *European Journal of International Law*, 2014, pp. 177 ff.

on certain techniques that could offer a solution to manage the most problematic aspects of this phenomenon.

CHAPTER II

JUDICIAL FUNCTION AND FRAGMENTATION

Summary: **1.** A Step Back: The Controversial Notion of the International Judicial Function **1.1.** The Development of International Dispute Settlement **1.2.** The Scope of the Judicial Function in the International Sphere **1.3** The Quest for Legitimacy of International Courts and Tribunals **2.** Plurality of Jurisdictions and the Fragmentation of the International Legal Order **2.1.** Fragmenting Patterns in International Law **2.2** The Proliferation of International Courts and Tribunals **2.3.** Fragmented Jurisdictions and Fragmented Jurisprudence **3.** The Development of Transversal Judicial Techniques to Mitigate the Problems of Fragmentation **3.1.** International Procedural Law: Issues Related to the Application of Domestic Solutions **3.2.** Cross-Fertilization and Judicial Dialogue **4.** Conclusion

1. A Step Back: The Controversial Notion of the International Judicial Function

1.1. The Development of International Dispute Settlement

As illustrated in the previous chapter, the exercise of judicial functions is a crucial element of the ongoing constitutionalization processes of legal orders at the international level. This raises the questions of what is meant by judicial function in the international realm and what are the consequences of globalization in this context.

As a starting point, it would be pointless to expect to find in the judicial function at the international level more than a slight resemblance with the features that characterize it in the domestic sphere.[232]

From that perspective, such function is one of the *raisons d'être* of the modern Nation-State, based on a system of permanent courts with compulsory jurisdiction that pursue the objectives set out by the State itself. Notably, States have established courts of various kinds all over their territories, having the power to issue binding decisions on almost any controversy. As a result of this complexity, domestic legal orders eventually

[232] *See* WILLIAM A. SCHABAS, *Introduction*, in WILLIAM A. SCHABAS AND SHANNONBROOKE MURPHY (Eds.), *Research Handbook on International Courts and Tribunals*, Cheletenham 2017, p. 1 (arguing that international dispute settlement is at an early stage of development compared to its equivalent in the domestic context and that it lacks a unifying body to direct such development).

developed rules to achieve a certain degree of consistency between the various decision-makers, envisioning a hierarchy and other rules of procedure which are inconceivable in the absence of a centralized power.

On the contrary, at the international level, the organization of justice is characterized by the decentralization and the consensual basis of jurisdiction.[233]

The reason for this divergence can be found by looking at how the system of international dispute settlement evolved over time, as briefly outlined in the following paragraphs.[234]

It appears that inter-State arbitration was developed in ancient Greece, primarily with the aim of resolving territorial disputes.[235] Hundreds of cases arising in the archaic period as well as in the Hellenistic era are reported by the ancient sources.[236] The point of reaching a peaceful settlement of such controversies was to avoid military conflicts and was achieved by delegating the decision to a neutral adjudicator, often belonging to a different *polis* from the ones involved in the dispute.[237]

The election of arbitration could be made when the parties were already litigating about something, but there have been cases in which existing treaties between Greek *poleis* provided for the arbitral resolution of future disputes, thus confirming that

[233] ALAIN PELLET, *Judicial Settlement of International Disputes*, in RÜDIGER WOLFRUM (Ed.), *Max Planck Encyclopedia of Public International Law Volume VI*, Oxford 2012, p. 526 (proposing these two distinguishing factors between domestic and international judicial function).
[234] For a general account of the history of international dispute settlement *see* among the others MARY ELLEN O'CONNEL AND LENORE VANDERZEE, *The History of International Adjudication*, in CESARE PR ROMANO, KAREN J. ALTER, YUVAL SHANY (Eds.), *The Oxford Handbook of International Adjudication*, Oxford 2014, pp. 40 ff.; CORNELIS G. ROELOFSEN, *International Arbitration and Courts*, in ANNE PETERS AND BARDO FASSBANDER (Eds.), *The Oxford Handbook of the History of International Law*, Oxford 2012, pp. 145 ff.
[235] As a matter of fact, arbitration was more in general a prominent dispute-resolution mean in the ancient world. DEREK ROEBUCK, *Ancient Greek Arbitration*, Oxford 2001 (displaying the use of arbitration in Greece both for public and private matters). This is also illustrated by the instances in which arbitration is used among mythological tales, such as in the episode of the Judgment of Paris., *Id.*, pp. 67-68.
[236] For a comprehensive collection of inter-State arbitral awards from the origins of the Greek civilization *see* LUIGI PICCIRILLI, *Gli arbitrati interstatali greci: Volume I Dalle origini al 338 a.C.*, Pisa 1973; ANNA MAGNETTO, *Gli arbitrati interstatali greci*: *Volume II Dal 337 al 196 a.C.*, Pisa 1997.
[237] ANNA MAGNETTO, *Interstate Arbitration and Foreign Judges*, in EDWARD M. HARRIS AND MIRKO CANEVARO (Eds.), *The Oxford Handbook of Ancient Greek Law*, Oxford forthcoming, p. 12.

arbitration was a recurring component of the relationship between city-states. In any event, the use of arbitration was unquestionably anchored to the consent of the parties to the dispute, whether it was given precisely to resolve an already ongoing dispute or beforehand, through an agreement concluded in peaceful times.[238]

Although this system had given rise to certain fixed procedural features and the collection of substantive guidelines for the conduct of international relations, it does not even come close to the current practice of international litigation, which is based on positive legal rules that bind the body issuing the decision, along with the parties to the dispute.[239]

This is also the case with inter-State arbitration in the Middle Ages. Indeed, after a significant decline during the Roman period, collectivities such as cities and local principalities frequently resorted to arbitration in order to resolve their differences.[240] Nonetheless, it remains unclear whether such procedures had a public or a private nature, given the confusion existing at that time in this connection. In addition, from time to time it is difficult to recognize the legal character of the relevant awards, given the prominent position of the Church and divine law through this epoch, evidenced by the role of the Pope in this system.[241]

Noticeably, arbitration started losing its significance at the end of the Middle Ages after the rise of Nation-States, which were not inclined to submit their disputes to the authority of third parties. Recognizing the power of other institutions was seen as a threat to their newly acquired sovereignty. As a matter of fact, notwithstanding their undertakings to resolve controversies without having recourse to the use of force –

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[238] *Id.*, pp. 4-5.

[239] *Id.*, p. 2 ("The action of an interstate arbitrator has always to be inspired by general standards of justice. Yet already in the Classical period and in connection with disputes about territory (the most common kind of dispute), a set of more specific principles begins to be formulated and spreads throughout the Greek world. The courts could refer to these principles for their decisions. The parties also used arguments based on these principles to justify their claims. We may not be able to speak of rules but rather of guidelines that can be interpreted.").

[240] WILHELM G. GREWE, *The Epochs of International Law*, translated and revised by Michael Byers, New York 2000, pp. 93 ff.

[241] *Id.*, p. 99 (stating, however, that the "high standard of development of medieval arbitration is reflected by the subtle elaboration of its legal forms, which closely resemble the basic structure of modern arbitral procedures.")

enshrined in the Peace of Westphalia – arbitration was not popular among States through the 16th , the 17th and the great part of the 18th century.[242]

Against this background, it is generally believed that modern international adjudication emerged at the end of the 18th century, with the signing of the so-called Jay Treaty between the United States and Great Britain, setting up commissions composed by members chosen by the parties to the treaty.[243] The main scope of these commissions was to determine the boundaries between the British Canadian possessions and the newly founded American Republic. Meanwhile, there was also an attempt to establish tribunals with the purpose of hearing claims of individual citizens of one State for damages caused by the other State.[244] While the legal nature of the decisions issued by the commissions is questionable – due to the relevance given to equity and rules of common sense – the whole architecture of the Jay Treaty indicates that it was a major step towards the use of legal means of dispute-resolution in the context of inter-States conflicts.[245]

The principle of international arbitration in Anglo-American relations was later confirmed in the *Alabama claims* case. In that proceeding, an arbitral tribunal ordered Great Britain to pay compensation amounting to the extraordinary sum – at that time – of 15.5 million USD, in light of its cooperation with the Confederate States of America during the American Civil War.[246] Remarkably, Great Britain complied with the judgment almost immediately, thus implicitly recognizing the binding nature of the decision. Having restored friendly relations between Great Britain and the United States

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[242] *Id.*, p. 104; LEO GROSS, *The Peace of Westphalia, 1648-1948*, 42 (1) *American Journal of International Law*, 1948, p. 25 (mentioning Articles CXIII and CXXIV of the Treaty of Münster, which is one of the agreements comprising the Peace of Westphalia.).

[243] GEORG SCHWARZENBERGER, *Present-Day Relevance of the Jay Treaty Arbitrations*, 53 *Notre Dame Law Review*, 1978 p. 715 (stating that the arbitrations under the Jay Treaty "are commonly treated as the starting point of present-day international adjudication.").

[244] Treaty of Amity, Commerce, and Navigation between the United States and Great Britain, dated 19 November 1794, 8 Stat. 116, Articles 5-7.

[245] GEORG SCHWARZENBERGER, *Present-Day Relevance of the Jay Treaty Arbitrations*, 53 *Notre Dame Law Review*, 1978 p. 721 (analyzing six features showing the judicial character of the Jay Arbitrations: "the professional qualifications of their members; the degree of autonomy granted to, and exercised by, the Commissions; the rules applied by the Commissions; the technical standards of their awards; their legal effects and; finally, the overall structure of the Commissions.").

[246] *Alabama claims of the United States of America against Great Britain*, Award, dated 14 September 1872. United States' claims concerned the violation of the principle of neutrality through the construction of warships that were subsequently transferred to the navy of the Confederate States.

without unnecessary military actions, the *Alabama claims* case instantly became an example of the advantages of arbitration, turning out to be a model for other States that had no interest in using force as the sole dispute-resolution method.[247]

These successes were at the basis of the progressive institutionalization of dispute settlement, prominently supported by the Czar of Russia Nicholas II through the Hague Peace Conferences of 1899 and 1907, where a first attempt to categorize and define the various available procedures was made.[248] At the heart of the movements leading to these negotiations was the idea that peace could only be achieved by introducing realistic alternatives to the use of force.

While proposals to establish a permanent judicial body failed, the greatest legacy left by the Hague Peace Conferences is the creation of the Permanent Court of Arbitration ('PCA'), an institution that still offers administrative services in connection with international arbitrations and other dispute settlement processes.[249] Basically, even though it does not perform any kind of judicial function *per se*, the PCA provides States with a reliable support in connection with their disputes, for example by retaining a list of readily available arbitrators. This was an essential step to make the peaceful resolution of controversies through a legal procedure achievable and effective but did not change the decentralized nature of international dispute settlement.

Later, in the first half of the 20th century, the Permanent Court of International Justice ('PCIJ) became the first institution with a permanent status and general

[247] For a detailed analysis of the case, putting it in modern perspective and taking into account current developments in international law *see* TOM BINGHAM, *The Alabama Claims Arbitration*, 54 *International and Comparative Law Quarterly*, 2005, pp. 1 ff.

[248] *See e.g.*, Hague Convention for the Pacific Settlement of International Disputes, USTS 392, dated 29 July 1899, ('1899 Hague Convention'), Article 15 ("International arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law."). The treaty recognizes arbitration as "the most effective, and at the same time the most equitable, means for settling disputes" of a legal nature. 1899 Hague Convention, Article 16.

[249] *Id.*, Articles 20-29. Of course, the two Hague Conferences had other crucial objectives, as evidenced by the other conventions negotiated, with particular regard to the conduct of war. *See* MAARTJE ABBENHUIS (Ed.), *War, Peace and International Order?: The Legacies of the Hague Conferences of 1899 and 1907*, New York 2017.

jurisdiction capable of deciding international disputes worldwide.[250] It was soon to be replaced after the establishment of the ICJ within the United Nations framework, which still maintained a certain degree of continuity with its predecessor.[251]

Notably, the UN Charter provides that international disputes between UN Members must be settled peacefully "in such a manner that international peace and security, and justice, are not endangered."[252] However, the newly introduced judicial body still founds its jurisdiction upon the consent of the parties. As previously affirmed by the PCIJ and universally accepted to this day:

> It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement.[253]

In this sense, the possibility for a State to voluntarily accept the jurisdiction of the ICJ with respect to all its international disputes does not really have an impact on its compulsory nature, as argued in the previous chapter.[254] First, because it requires that both the parties to the dispute have made declarations in conformity with Article 36 of the ICJ's Statute. Second, because it is always possible to withdraw such declarations or limit their scope, as it has been done multiple times in the history of the World Court.[255]

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[250] As a matter of fact, the first permanent international court – active in a regional context – was the Central American Court of Justice, a short lived regional institution established in 1907. *See* KATRIN NYMAN METCALF AND IOANNIS PAPAGEORGIOU, *Regional Integration and Courts of Justice*, Antwerpen and Oxford 2005, pp. 28-30.

[251] UN Charter, Article 92 (stating that the ICJ shall "function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice."). *See also* ICJ Statute, Article 37.

[252] UN Charter, Article 2.3. *See also General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, General Assembly Resolution 2625 (XXV), dated 24 October 1970.

[253] PCIJ, *Status of the Eastern Carelia*, Advisory Opinion, in PCIJ Series B No 5, dated 23 July 1923, para. 33. This fundamental principle was later confirmed by the ICJ in its jurisprudence. *See e.g.*, ICJ, *Case of the Monetary Gold removed from Rome in 1943* (Italy v. France et al.), Judgment, in *ICJ Reports 1954*, dated 15 June 1954, p. 17 (recalling "a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent.").

[254] *See* § I.2.1.

[255] These critical issues were summarized in a simple question by GEORGE ABI-SAAB, *The Normalization of International Adjudication: Convergence and Divergencies*, 43 (1)

Furthermore, while the ICJ is the only international court with such general jurisdiction, it is certainly not the sole body exercising a judicial function at the international level. As will be discussed elsewhere in this chapter, there is currently a profusion of courts, tribunals and arbitral institutions envisaged to peacefully resolve international disputes through the application of rules of a legal nature.[256]

These bodies often possess a slightly enhanced form of compulsory jurisdiction, meaning that the participation to a treaty requires the acceptance of the jurisdiction of the institution established by the same treaty to resolve future controversies between the parties.[257]

However, this ongoing shift has not affected the essential relevance of the will of the parties as an indispensable part of international dispute settlement, which still maintains a fundamental arbitral nature.[258]

Even when it comes to institutions having such compulsory jurisdiction, it is always possible to withdraw from the relevant treaties or otherwise hinder their ability to effectively decide disputes, as recently demonstrated by the decline of the WTO Appellate Body, described in the previous chapter.[259]

Ultimately, the need of consent and the lack of centralization have been characterizing the judicial function on a global scale for a long time and still constitute essential elements of the jurisdiction of international courts and tribunals that distinguish them from their domestic counterparties.

International Law and Politics, 2010, p. 4 ("For how compulsory is a system that requires one to opt for it to become compulsory?").

[256] *See* § II.2.2.

[257] For instance, the jurisdiction of WTO panels is compulsory and exclusive with regards to trade disputes between its members, without prejudice to dispute settlement mechanisms provided for in regional trade agreements. Dispute Settlement Understanding, Articles 3.8. and 23.1. *See* § I.2.2.

[258] Among the others, *see* BENEDETTO CONFORTI, *Diritto internazionale*, 10th edition, Napoli 2014, p. 460; ATTILA TANZI, *Introduzione al diritto internazionale contemporaneo*, 5th edition Padova 2016, p. 322.

[259] *See* § I.2.2. Given the backlash against international cooperation in recent years, there are numerous other examples of this kind. *See e.g.*, the case of the Tribunal of the Southern African Development Community, whose operation has been halted by the political opposition of a group of States, affected by some adverse decisions on its part. *See* KAREN J. ALTER, JAMES T. GATHII, LAURENCE R. HELFER, *Backlash against international courts in west, east and southern Africa: causes and consequences*, in *European Journal of International Law* 27(2), 2016, pp. 306 ff.

Similarly rooted in the history of international dispute settlement is the aim of guaranteeing security at the global level through the resolution of conflicts that could escalate to the use of force.[260] From this point of view, there is certainly a parallelism between the idea of achieving peace among individuals, comprising the members of the domestic community, and among States, comprising the members of the international community.

1.2 The Scope of the Judicial Function in the International Sphere

As the evolution outlined above suggests, the scope of the judicial function in the international sphere is to resolve disputes of an international nature through legal rules-based decisions of a binding character issued by a third party.[261]

Depending on the various possible interpretations of the key elements comprising this definition, the notion of judicial function might have a wider or narrower extent.

Notoriously, the PCIJ construe the meaning of the term dispute in the *Mavrommatis* case in the following way:

> A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons.[262]

Thus, it could be said that disputes arise in international law for the same reason they arise in the domestic framework or in any community where equal members interact with each other: a divergence of opinion between opposing parties.

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[260] In this regard, *see* UN Charter, Article 1 (listing as a purpose of the UN "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.").
[261] In this sense, among the other manifold definitions, *see* in particular HERSCH LAUTERPACHT, *The Function of Law in the International Community*, Oxford 1933, p. 59 ("International judicial settlement—a term which in its essential meaning includes international arbitration—is a method of settling disputes between States by a binding decision based upon rules of law"). Clearly, such definition does not take into account how the judicial function should be exercised and for which subjective purposes. *See* § II.1.3.
[262] PCIJ, *The Mavrommatis Palestine Concessions Case* (Greece v. Britain), Judgment, in PCIJ Series B No 2 1924, dated 30 August 1924, para. 19.

In this regard, the ICJ has managed to refine such an extensive notion, which was subsequently adopted in other fields.[263]

For instance, in a much-debated case decided with the casting vote of its President, the World Court explained that – for the purpose of assessing its jurisdiction – a dispute should concern those who hold the contentious legal interest, in the sense that a party must answer for its conducts to the other party to the dispute.[264] Further, the ICJ clarified that it does not have any obligation to issue a ruling when it would result in "an academic pronouncement or a moot decision" because of the development of the situation.[265]

Accordingly, international courts and tribunals have the task to dispense justice and not to rule on controversies that might be only apparent or devoid of practical consequences.[266]

At the same time, as will be discussed later, judicial and arbitral bodies are not mere one-time decision-makers, since they are more and more often concerned with the long-term consequences of their decisions, mindful of their role as crafters of the rules of international law.[267]

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[263] *See* CHRISTOPH SCHREUER, *What Is a Legal Dispute?*, in ISABELLE BUFFARD ET AL. (Eds.), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*, Leiden and Boston 2008 (with ample references to the case law of the PCIJ, ICJ and international arbitration tribunals.).

[264] ICJ, *South West Africa Cases* (Ethiopia and Liberia v. South Africa), Judgment on the Second Phase, in *ICJ Reports 1966*, dated 18 July 1966, para. 48 (holding that individual members of the former League of Nations did not have any direct legal interest in the respect of obligations arising from the League's Mandates).

[265] ICJ, *The Northern Cameroons Case* (Cameroon v. United Kingdom), Judgment, in *ICJ Reports 1963*, dated 2 December 1963, para. 59 (refusing to make a ruling because Cameroon had sought the interpretation of a Treaty that was no longer in force and whose continuing application was no longer possible.). *See also* ICJ, *Nuclear Tests Case* (Australia v. France), Judgment, in *ICJ Reports 1974*, dated 20 December 1974 (affirming, controversially, that the "the existence of a dispute is the primary condition for the Court to exercise its judicial function" and that therefore the "dispute brought before it must therefore continue to exist at the time when the Court makes its decision.").

[266] For a critical assessment of the recent case law of the ICJ, adding a new requisite in relation to the awareness of a dispute for the admissibility of a case, *see* LORENZO PALESTINI, *Forget About Mavrommatis and Judicial Economy: The Alleged Absence of a Dispute in the Cases Concerning the Obligations to Negotiate the Cessation of the Nuclear Arms Race and Nuclear Disarmament*, 8 (3) *Journal of International Dispute Settlement*, 2017, pp. 557 ff.

[267] *See* § II.2.3. *See also* FUAD ZARBIYEV, *Judicial Activism in International Law: A Conceptual Framework for Analysis*, 3(2) *Journal of International Dispute Settlement*, 2012, pp. 247 ff.

With regards to the international nature of a dispute, it could be argued that the international judicial function may be exercised only in relation to the controversies between entities with an international legal personality. From this perspective, only disputes between States – as claimed, among the others, by Sir Hersch Lauterpacht[268] – or arguably between States and International Organizations may entail the exercise of a judicial function at the international level.

Conversely, from another perspective, it could be argued that a dispute has an international nature whenever the application of international law is at stake. This would imply that even national courts applying rules of an international character should be considered as relevant players in the exercise of the international judicial function, despite the fact that they operate inside domestic legal orders.[269]

An intermediate position between these two radical interpretations is to take into account organs whose jurisdiction is provided for in an international treaty, charged with the resolution of transnational disputes involving a sovereign institution on one side and other subjects on the other side, including individuals and private entities.[270]

This seems to be the preferable option, since it allows to take into account the great number of new international courts and tribunals created in response to the increasing relevance of entities other than States in international relations.[271] At the same time, it does not excessively widen the notion of international dispute, limiting it to the cases in which the relevance of a conflict is explicitly provided for in an international treaty. Nevertheless, the decisions of domestic courts are often intertwined with those of

[268] *See* HERSCH LAUTERPACHT, *The Function of Law in the International Community*, Oxford 1933, p. 59.
[269] As argued *inter alia* by ANTONIOS TZANAKOPOULOS, *Domestic Courts in International Law: The International Judicial Function of National Courts*, 34 *Loyola of Los Angeles International and Comparative Law Review*, 2011 p. 163 ("Domestic courts are thus part of an integrated architecture of the international judicial function")
[270] *See* CESARE PR ROMANO, KAREN J. ALTER, YUVAL SHANY, *Mapping International Adjudicative Bodies, the Issues, and Players*, in CESARE PR ROMANO, KAREN J. ALTER, YUVAL SHANY (Eds.), *The Oxford Handbook of International Adjudication*, Oxford 2014, p. 6.
[271] WILLIAM A. SCHABAS, *Introduction*, in WILLIAM A. SCHABAS AND SHANNONBROOKE MURPHY (Eds.), *Research Handbook on International Courts and Tribunals*, Cheletenham 2017, pp. 13-14.

international courts and tribunals and, as a result, they cannot be ignored in many circumstances.[272]

Moving forward, the exercise of a judicial function entails that the decision is reached on the basis of the application of a legal rule, a feature that was missing in the early ages of inter-State arbitrations in the ancient Greece and through the Middle Ages, as seen above, but that has become crucial in more recent times.

Otherwise, the procedure could be described as a diplomatic method to resolve disputes, which have been more popular in the international sphere, as a matter of fact. Conventionally, diplomatic techniques comprise negotiation, good offices, mediation, inquiry and conciliation, all belonging to the general category of peaceful dispute settlement procedures.[273]

A third party which is not involved in the dispute may act as an intermediary in these procedures, except in the case of negotiation, which is undertaken by the same disputing parties. However, the resolution of the controversy is based on a political arrangement and is not the result of the application of rules of a legal nature. As a consequence, even though a third party may have a role in settling the dispute, a larger margin of appreciation is left compared to proceedings in front of an international court or a tribunal, which are generally subject to international law.[274]

Diplomatic techniques of dispute settlement were the preferred choice of Nation-States after the Peace of Westphalia precisely on this account. As argued by Sir Gerarld Fitzmaurice, States

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[272] For instance, as discussed below, domestic courts have a fundamental role when it comes to the enforcement of international decisions, as can be seen in § III.3.2.

[273] For a comprehensive examination of dispute settlement procedures at the international level, including the diplomatic methods mentioned *see* JOHN G. MERILLS, *International Dispute Settlement*, 5th Edition, Cambridge 2011. *See also* United Nations Office of Legal Affairs. *Handbook on the Peaceful Settlement of Disputes between States*, New York 1992.

[274] In this regard, decisions *ex aequo et bono* – a rare occurrence in international dispute settlement – represent an exception which always requires the consent of the parties. As recognized by the ICJ, an international arbitration is based on an agreement "to submit their case to an arbitral tribunal made up of judges chosen by them, who would rule either on the basis of the law or *ex aquo et bono*" while it does not suffice to leave the decision of a controversy to a third party *per se*. ICJ, *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Qatar v. Bahrain), Judgment on the Merits, in *ICJ Reports 2001*, dated 16 March 2001, para. 114.

> dislike the loss of control that is entailed over the future of the case, the outcome of which they can no longer influence politically once it is before a court of law, since this will then depend upon legal considerations with which they do not find themselves at home.[275]

On the contrary, there have been circumstances in which jurisdiction was denied because the central issue of a case could not be framed as a legal question but presupposed a political approach, founded on power-based dynamics.[276]

Still, this does not mean that international courts and tribunals may dismiss their cases for the simple reason that political interests are at stake. Otherwise, there would not be any case to decide, given the nature of disputes in the international arena and its primary actors.[277]

Another distinguishing feature of the exercise of judicial function as opposed to diplomatic procedures of dispute settlement concerns the binding nature of the final decisions. In fact, in the latter case, the solution of the controversy is left entirely to the discretion of the parties, which can freely choose to abide to the non-binding proposals made in the course of negotiations.[278]

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[275] Institut de Droit International, *Livre du Centenaire 1873-1973*, Basel 1973, p. 279, as cited by IAN BROWNLIE, *The Peaceful Settlement of International Disputes*, 8 (2) *Chinese Journal of International Law*, 2009, p. 281.

[276] ICJ, *Haya de la Torre Case* (Colombia v. Peru), Judgment, in *ICJ Reports 1951*, dated 13 June 1951, p. 79 (refusing to make a choice on behalf of the parties because such a decision "could not be based on legal considerations, but only on considerations of practicability or of political expediency; it is not part of the Court's judicial function to make such a choice."). *See also* ICJ, *South West Africa Cases* (Ethiopia and Liberia v. South Africa), Judgment on the Second Phase, in *ICJ Reports 1966*, dated 18 July 1966, para. 49 ("The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.")

[277] *See e.g.*, ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment on Jurisdiction and Admissibility, in *ICJ Reports 1984*, dated 26 November 1984, para. 96 (recognizing the differences between political and judicial functions but still affirming that "the Court has never shied away from a case brought before it merely because it had political implications or because it involved serious elements of the use of force.").

[278] *See e.g.*, 1899 Hague Convention, Article 6 ("Good offices and mediation, either at the request of the parties at variance, or on the initiative of Powers strangers to the dispute, have exclusively the character of advice and never have binding force."). In limited cases, however, the parties

Therefore, the parties need to reach an agreement not only with respect to the procedure to resolve their dispute but they also need to specifically accept the outcome reached at the end of such procedure, contrary to what happens in a proceeding in front of a court or a tribunal. In that context, the parties implicitly accept to give effect to the final decisions by submitting their case in a given forum.[279] The flexibility of diplomatic procedures is another key aspect based on which States usually prefer to settle their disputes through negotiations, because they allow them to preserve their sovereignty.

At the same time, the absence of a binding legal framework both at the procedural and the substantive level is one of the major shortcomings of these techniques. As a matter of fact, the resort to international adjudication or arbitration is often provided for in the context of a negotiation or a mediation to overcome the impasse caused by the completely diverging and irreconcilable positions of the parties to the dispute. [280] In fact, a compromise is not always easily reachable.

Additionally, the binding nature of their decisions differentiates international courts and tribunals from other institutions with the task of reviewing and monitoring the implementation of certain international treaties. While there are circumstances in which this type of bodies might discuss the existence of a breach on the part of a State in the context of an individual's complaint, such rulings do not usually create legal obligations upon the parties to the disputes.[281]

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may accept the binding effect of the result of a diplomatic procedure. JOHN G. MERILLS, *International Dispute Settlement*, 5th Edition, Cambridge 2011, p. 46 (referring to the *Tiger* case between Spain and Germany – decided through a Commission of Inquiry – but still underlying the distinctive character of fact-finding compared to arbitration.).

[279] VINCENZO CANNIZZARO, *Diritto Internazionale*, Torino 2016, p. 372.

[280] For instance, the Algiers Accords between the United States and Iran put an end to the Iran hostage crisis by also referring pending disputes among citizens and governments of the respective countries to international arbitration, through the creation of the Iran-United States Claims Tribunal.

[281] As an example, the International Covenant on Civil and Political Rights established the Human Rights Committee ('HRC'), a body of independent experts to review the compliance of States parties to the human rights obligations of the treaty. International Covenant on Civil and Political Rights, 999 UNTS 171, dated 16 December 1966 ('ICCPR'), Article 28. Under the ICCPR's First Optional Protocol it may also consider individual petitions concerning breaches of human rights obligations. However, the final views expressed by the HRC do not have a binding character. As noted by the CJEU the HRC "is not a judicial institution" and its "findings have no binding force

Thus, while the existence of a dispute and its international nature are common features of all the peaceful dispute settlement procedures at the international level, the exercise of a judicial function presupposes the legality and finality of the decision. For instance, the institutions analyzed in the first chapter – the ICJ, the WTO Appellate Body and the CJEU– have the power to issue binding decisions and base their findings on legal reasoning.[282]

Furthermore, it is possible to make a further distinction between permanent and temporary organs with the task of resolving disputes on a global scale.[283] In the words of Chittharanjan Amerasinghe:

> The observations to be made are that adjudicatory settlement of international disputes has become a common feature of international relations, has taken effective shape and has developed into one of the most viable means of international dispute settlement, even though it may not be the only one to which resort is had; and now manifests itself in two forms—the arbitration and the standing court—both forms consisting of a diverse content.[284]

This difference is mainly reflected in the opportunity for the parties to choose their own judges and the procedural framework to be applied over the course of arbitral proceedings. Permanent courts such as the ICJ or the CJEU have instead predetermined rules of procedures and full-time judges assigned to each case. Still, the arbitral and

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in law." CJEU, *Lisa Jacqueline Grant v South-West Trains Ltd.*, Case C-249/96, Judgment, dated 17 February 1998, para. 46.

[282] There are of course complicated cases such as the system outlined in the Dispute Settlement Understanding in the context of the WTO. The difficulty lies in the fact that final decisions are adopted by the Dispute Settlement Body, an organ which is different from the Dispute Panels and the Appellate Body that have issued the actual ruling. However, it can be said that the judicial function is *de facto* exercised at the level of Dispute Panels and Appellate Body, since the consensus rule practically prevents the Dispute Settlement Body to have a role in deciding the dispute. *See* § I.2.2.

[283] In this regard, it is possible to include within the definition of international court and tribunal only permanent bodies. *See* CHRISTIAN TOMUSCHAT, *International Courts and Tribunals*, in RÜDIGER WOLFRUM (Ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford 2012.

[284] CHITTHARANJAN F. AMERASINGHE, *Jurisdiction of International Tribunals*, The Hague 2003, p. 34. *See also* CHITTHARANJAN F. AMERASINGHE, *International Arbitration: A Judicial Function?*, in RÜDIGER WOLFRUM ET AL. (Eds.), *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas*, Leiden 2016, p. 688 ("International arbitral tribunals basically do perform judicial functions."); HERSCH LAUTERPACHT, *The Function of Law in the International Community*, Oxford 1933, p. 59 ("International judicial settlement [is] a term which in its essential meaning includes international arbitration").

judicial settlement of disputes have many common features that allow to put them together and analyze them through the same prism.[285]

1.3 The Quest for Legitimacy of International Courts and Tribunals

The previous paragraph was focused at reviewing the features of international dispute settlement with a view to showing what the judicial function is and how it can be distinguished from other phenomena. A related issue, which has more to do with what the judicial function should be, concerns the subjective traits that an adjudicative body must possess and more in general the guarantees that must be safeguarded throughout an international legal proceeding.

In fact, if international courts and tribunals have a role that can be compared to similar domestic institutions – although their jurisdiction is not compulsory and they lack a supervising authority – a question arises over the legitimacy of the international judiciary.[286] As effectively summarized by Nienke Grossman

> An international court is legitimate when its authority is perceived as justified.[287]

The rule of consent ensures that sovereign States cannot be a party to a proceeding against their own will. However, there are other aspects that influence the adherence to international dispute settlement as well as its consideration among the public. They relate to the very nature of third-party adjudication, whose rationale should not be disregarded in the international domain.

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[285] This is also evidenced by the literature that analyses third-party dispute settlement means (comprising both *ad hoc* arbitral tribunals and permanent courts) in comparison with diplomatic techniques of dispute settlement.) *See e.g.*, LAURENCE BOISSON DE CHAZOURNES, *Diplomatic and Judicial Means of Dispute Settlement*, Leiden and Boston 2013. *Contra* ALAIN PELLET, *Judicial Settlement of International Disputes*, in RÜDIGER WOLFRUM (Ed.), *Max Planck Encyclopedia of Public International Law Volume VI*, Oxford 2012, p. 526 (recognizing, however, the major overlaps between the two systems).

[286] This issue has attracted the attention of the scholars, particularly in recent times. *See inter alia* HÉLÈNE RUIZ FABRI ET AL. (Eds.), *International Judicial Legitimacy: New Voices and Approaches*, Baden-Baden 2020*;* NIENKE GROSSMAN ET AL. (Eds.), *Legitimacy and International Courts*, Cambridge 2018; ARMIN VON BOGDANDY AND INGO VENZKE, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23(2) *European Journal of International Law*, 2012.

[287] NIENKE GROSSMAN, *Legitimacy and International Adjudicative Bodies*, 41 *George Washington International Law Review*, 2009, p. 114.

Primarily, it is crucial to understand which qualities are to be found among the individual members of international courts and tribunals, the judges and arbitrators that administer international justice.

On a preliminary note, it should be borne in mind that international judges and arbitrators are appointed by the same States whose conducts are at the center of the cases brought in front of them.

This is evident with respect to *ad hoc* arbitration since usually the same parties of a dispute are responsible for the appointment of the arbitral tribunal's members.[288] As a consequence, the possibility to act as an arbitrator depends on the choice of the parties. Therefore, arbitrators may be inclined to take a certain decision in a dispute pending in front of them, thus affecting their judgment, in order to have more chances to act as arbitrators in the future.[289]

At the same time, this is also true in connection with permanent courts, whose judges are appointed through complex procedures, because States often maintain an indirect and yet important role in their selection.[290]

[288] Generally, arbitral tribunals are composed by an uneven number of arbitrators, to assure the possibility of reaching a decision. Quite often, each party selects a member of the tribunal while a "neutral" member is decided by means of an agreement between the parties or the selected arbitrators. JOHN G. MERILLS, *International Dispute Settlement*, 5th Edition, Cambridge 2011, p. 86.

[289] See, on the other hand, the following contribution which is skeptical in relation to the effects of such "dependency" in *ad hoc* adjudicative bodies ERIC POSNER AND JOHN C. YOO, *Judicial Independence in International Tribunals*, 93 *California Law Review*, 2005, p. 21 (stating that "States, therefore, will use international adjudication only if the tribunal, over time, provides an accurate (or politically sensitive) judgment within the win set. If the tribunal violates its instructions and allows the personal preferences, ideological commitments, or national loyalties of its members to influence the judgment too much, then compliance might not occur. States will use tribunals and comply with their judgments only if they believe that the judgments will be unbiased.").

[290] For instance, ICJ Judges are elected by the United Nations General Assembly and the Security Council from lists of candidates designated by the members of the PCA for each State. ICJ Statute, Article 4. In addition, a party may also appoint an *ad hoc* judge of its nationality if there is not one already in the bench. ICJ Statute, Article 31. *See also* TFEU, Articles 253-255.

Additionally, judges and arbitrators necessarily possess one or more nationalities. Whenever they are dealing with a case involving their States of origin, their allegiance could affect their judgment and the outcome of the case.[291]

In light of the above, the members of an international court or tribunal should bear in mind that they do not represent any particular government when exercising their functions and should not be supportive or supported by any particular State.[292]

More in general, since these institutions requires the involvement of a third party to resolve a dispute, they must respect the basic principles of independence and impartiality. These two fundamental characteristics are key to foster the acceptance of the exercise of judicial functions in the international arena.[293]

As made clear in the case law related to investment law disputes:

> Impartiality refers to the absence of bias or predisposition towards a party. Independence is characterized by the absence of external control. Independence and impartiality both 'protect parties against arbitrators being influenced by factors other than those related to the merits of the case.'[294]

[291] Systems are in place to safeguard the variety in this regard and avoid criticism on account of a Eurocentric bias. *See e.g.*, ICJ Statute, Articles 3 and 9 (preventing the possibility of the appointment of two judges with the same nationality and affirming that "the representation of the main forms of civilization and of the principal legal systems of the world should be assured" in the body as a whole.). *See also* Dispute Settlement Understanding, Article 17(3).

[292] *See e.g.*, ICJ Statute, Article 16 ("No member of the Court may exercise any political or administrative function."). The relationship between international judges and appointing States has been described within the Principal-Agent theory or Principal-Trustee to account for the influence of politics in the decisions of international courts and tribunals. KAREN J. ALTER, *Agents or Trustees? International Courts in their Political Context*, 14(1) *European Journal of International Relations*, 2008, pp. 33 ff.

[293] As affirmed by Thomas Franck "the problem of bias really arises from the manipulable quality of legal principles. There are certainly things that can be done to reduce that problem as well as other human problems that attach to the task of judging and to the profession of being a judge. They ought not to be considered trivial because the extent to which one is successful in reducing the problems of bias, or the apparent or perceived problems of bias, to that extent will the judicial function be given a larger share in the matrix of remedies available in designing our future." EDWARD GORDON ET AL., *The Independence and Impartiality of International Judges*, 83 *Proceedings of the Annual Meeting of the American Society of International Law*, 1989, p. 520.

[294] This formulation has been repeatedly endorsed by investment tribunals. *See*, most recently, with references to other past similar decisions, *AS PNB Banka and others v. Republic of Latvia*, ICSID Case No. ARB/17/47, Decision On The Proposals To Disqualify Messrs. James Spigelman, Peter Tomka And John M. Townsend, dated 16 June 2020, para. 157.

Unsurprisingly, these issues are of the utmost importance especially in the context of arbitration. As already mentioned, *ad hoc* arbitrators are appointed precisely by the parties of a given dispute. Therefore, conflicts of interests can be more common than in the case of permanent courts' judges, where the parties do not directly take part in the formation of the adjudicative body. In turn, this entails a greater risk with respect to impartiality.

Numerous techniques are envisaged to prevent these situations or to prevent a biased judge or arbitrator from deciding a case.[295] Meanwhile, there has also been an attempt to pre-determine the circumstances that create a risk of bias for the member of an international court and tribunal, in order to give a reliable measurement to a notion that would be otherwise difficult to assess in practice.[296]

With respect to independence, there are a number of critical factors that should be taken into account, including the financial resources of the institution and in general its reliance on national governments.[297] The autonomy of permanent judicial bodies also depends on their internal organization, which must safeguard the transparent selection of members as well as of the cases assigned.

A related aspect concerns the legal qualifications and competences that a judge or an arbitrator must possess in order to exercise this kind of function.[298] The background of the members of adjudicative bodies is diverse – ranging from academic to diplomatic experience – but they are expected at least to be familiar with general international law as well as the specific field in which the dispute they are adjudging arose. Often, the compromissory clauses expressly state the professional status that an arbitrator must possess in order to be appointed.

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[295] *See*, extensively, CHIARA GIORGETTI (Ed.), *Challenges and Recusals of Judges and Arbitrators in International Courts*, Leiden and Boston 2015. At the same time, the lack of impartiality or independence is often considered a ground to challenge the validity of the decision rendered by the court or the arbitral tribunal.

[296] *See*, for instance, International Bar Association ('IBA') Guidelines on Conflicts of Interest in International Arbitration, dated 23 October 2014.

[297] DANIEL TERRIS, CESARE P. R. ROMANO, LEIGH SWIGART, *The International Judge: An Introduction to the Men and Women who Decide the World's Cases*, Waltham 2007.

[298] ICJ Statute, Article 2; TFEU, Article 253; Dispute Settlement Understanding, Article 17(2)

Furthermore, the legitimacy of international courts and tribunals does not depend only on the individual characteristics of judges but also on the procedural guarantees that must be applied in a legal proceeding. As recalled by Joseph Weiler:

> The legitimacy of courts rests in grand part on their capacity to listen to the parties, to deliberate impartially favouring neither the powerful nor the meek, to have the courage to decide and then, crucially, to motivate and explain the decisions.[299]

Due process entails the recognition of the right of the defense, which is primarily recognized by giving the parties the possibility to make their case, with particular regard to the time granted for their submissions. Likewise, it is crucial that the principle of the equality of the arms is acknowledged and respected, so that the parties have the same opportunities to present their case.[300]

In this context, different adjudicating bodies enjoy a different amount of discretion. By way of example, international criminal tribunals must strictly respect international fair trial standards, given the public nature of their jurisdiction and the "axiomatic" character of such principles.[301] On the other hand, *ad hoc* tribunals are in a completely different position, because their power to influence the conduct of proceedings ultimately depends on the will of the parties.

In fact, since the parties have the final saying on the procedural aspects of the case, it would appear that they are in a position to disregard issues concerning impartiality and due process, even to their own detriment. However, within the enforcement

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[299] JOSEPH H.H. WEILER, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 *Journal of World Trade*, 2001, p. 204

[300] *See*, extensively, CHARLES T. KOTUBY AND LUKE A. SOBOTA, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes*, New York 2017. Still, it has been recently noted that there is a risk tribunals are caught by due process paranoia, defined as "a perceived reluctance by tribunals to act decisively in certain situations for fear of the arbitral award being challenged on the basis of a party not having had the chance to present its case fully." Queen Mary, University of London: 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, p. 10.

[301] For the view that such standards are part of *jus cogens see* the following contribute of the President of President of the United Nations International Criminal Tribunal for the Former Yugoslavia *see* PATRICK ROBINSON, *The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY*, 3 *Berkeley Journal of International Law*, 2009, pp. 1 ff.

proceedings at the domestic level, national courts must verify the respect of minimum required guarantees and may raise the issue of *ordre public* to refuse the enforcement.[302]

Thus, it might be said that the respect of due process and impartiality is in a certain sense entrusted to domestic remedies, with the consequence that international courts and tribunals are not at all dispensed by the respect of due process.[303]

Against this background, the need to explain the reasons of the decisions is fundamental to ensure the respect of the above-mentioned principles. Indeed, the lack of impartiality and due process is usually reflected in the absence of a logic and well-supported decision. Therefore, the explanation of the legal and factual reasoning has become one of the key principles, universally recognized in transnational civil procedure.[304]

Finally, the legitimacy of these institutions depends on the public opinion, which is often seen as a critical aspect with respect to distant organs, particularly when they do not appear to have a democratic nature.[305] Significantly, this issue turned to be ever more important on account of the enhanced role of individuals in the international arena. Since

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[302] *See e.g.*, United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38, dated 10 June 1958, Article V(2)(b) ("Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that . . . recognition or enforcement of the award would be contrary to the public policy of that country.").

[303] This role has been also recognized within the framework of the ECHR. *See* European Commission of Human Rights, *Jakob Boss Sohne KG v. The Federal Republic of Germany*, Decision, Application No. 18479/9, dated 2 December 1991, p. 3. Such decision means that the parties to the ECHR are responsible for the violation of rights occurred in arbitral proceeding, even though arbitral tribunals' conducts cannot *per se* entail the responsibility of the State, whenever national courts should have intervened to address violations of fundamental rights.

[304] As noted by HERSCH LAUTERPACHT, The Development of International Law by the International Court, Cambridge 1982, p. 40 ("The problem of judicial impartiality . . . is a problem which cannot be solved by mere devices of machinery. But it can be considerably alleviated by the fullest possible completeness of judicial reasoning which renders it practicable for everyone to know and to assess the value of the grounds of the decisions given by an international tribunal.").

[305] Nevertheless, empirical studies suggested that the trust in international courts is strictly correlated with the support for the national judiciary, showing that the public opinion does not generally consider international litigation as a substitute for underperforming internal systems. ERIK VOETEN, *Public Opinion and the Legitimacy of International Courts*, 14(2) *Theoretical Inquiries in Law*, 2013, pp. 411 ff.

people are directly affected by international law, its application by international judges and arbitrators has risen increasing concern.

From this perspective, the transparency of legal proceedings and final decisions may have the important role of showing whether the judicial function is performed in a fair way, at least with respect to those that are not familiar with this system.

Thus, the intervention of *amici curiae* in international proceedings has increasingly become the norm for many permanent and *ad hoc* institutions.[306] It is said that this instrument enhances the public availability of information in relation to international dispute, giving at the same time the chance to put collective interests at the center of the discussion.

Similarly, the web broadcasting and video-recordings of the hearings added a public dimension to international disputes that was not conceivable before the internet revolution.[307]

[306] *See* extensively ASTRID WIIK, *Amicus Curiae before International Courts and Tribunals*, Baden-Baden 2018.

[307] THORE NEUMANN AND BRUNO SIMMA, *Transparency in International Adjudication*, in ANDREA BIANCHI AND ANNE PETERS (Eds.), *Transparency in international law*, Cambridge 2013, p. 453 ("[A]udio-visual media may compensate for the frequently existing geographical distance between courts and affected populations, and thereby alleviate to a certain degree concomitant access-to-information inequalities. It may also enable illiterate persons to follow the proceedings. International courts typically decide highly politicized cases which generate a particularly strong public interest.")

2. Plurality of Jurisdictions and the Fragmentation of the International Legal Order

2.1 Fragmenting Patterns in International Law

The study of fragmentation in the international context has been at the center of the doctrinal debate since the first years of the 21st century, stimulating the discussion over the undergoing evolution of international law.[308]

In the field of biology, fragmentation constitutes a form of reproduction "in which an organism breaks into different parts, with each part growing into a complete new organism."[309] More in general, fragmentation relates to the idea of breaking something into multiple parts, but it usually conveys a negative connotation.[310] In fact, when a unified system breaks up, the development of independent structures might cause a chaotic state, which in turn will have an impact on the sum of the individual parts. It is considered a risk to lose the degree of uniformity that such wholeness assures.

International law is clearly exposed to this risk because – precisely as a domestic legal order – it comprises many diverse fields, ranging from the regulation of activities in the international seabed area to the sovereignty of States over the atmospheric space.[311] However, unlike domestic legal orders, international law has a global scope because it is not limited to a particular region or area of the planet and, most

[308] While this paragraph will try to outline the fundamental traits of fragmentation, there have been a variety of insightful treatises covering this subject in a comprehensive way, among which, *see* ISABELLE BUFFARD ET AL. (Eds.), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*, Leiden and Boston 2008; MARGARET A. YOUNG (Ed.), *Regime Interaction in International Law: Facing Fragmentation*, Cambridge 2012; MADS ANDENAS AND EIRIK BJORGE (Eds*.), A Farewell to Fragmentation : Reassertion and Convergence in International Law*, Cambridge 2015.

[309] Cambridge Dictionary, *available at* https://dictionary.cambridge.org/.

[310] See, however, BRUNO SIMMA, *Fragmentation in a Positive Light*, 25 (4) *Michigan Journal of International Law*, 2005, p. 847 (stressing the positive outcomes surrounding the fragmentation of international law, such as the expansion of international law and its diversification.).

[311] For the idea that the status of fragmentation of the international legal order recalls the one of domestic legal orders in their path towards constitutionalization, with particular regard to the situation of the United Kingdom, *see* COLIN MURRAY AND AND AOIFE O'DONOGHUE, *A Path Already Travelled in Domestic Orders? From Fragmentation to Constitutionalisation in the Global Legal Order*, 13(3) *International Journal of Law in Context*, 2017, pp. 225 ff.

importantly, it lacks a legislative body with competences and powers comparable to those of domestic legal orders.[312]

Fragmentation at the international level may therefore be a consequence of functional specialization, such as in the case of the development of international trade law, or may be based on inevitable regional differences, exemplified by the existence of the several human rights treaties established at a continental level, such as the ECHR or the American Convention on Human Rights.

While this problem has already been noted throughout the 20th century by scholars that have emphasized the multifaceted nature of international law,[313] such tendency could not but increase after the end of the Cold War, considering the rise of globalization and its significant impact in shaping international law, outlined in the first chapter.[314]

From this perspective, globalization brought new players in the international arena and also required newer and more specialized rules in order to adjust the international legal order to the technological and cultural changes of the last decades. Even putting aside previous circumstances in which "self-contained regimes" have been relevant,[315] they had become a necessity to keep up with the modern times, because of the expansion of international law.

Against this background, the study of fragmentation in the international context may start from two different sets of assumptions.

On one hand, it could be argued that international law is evolving precisely from its various regional and sectoral fragments and that the unity of the system cannot be

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[312] With respect to the causes of fragmentation in the international context *see* the effective summary made by GERHARD HAFNER, *Pros and Cons Ensuing from Fragmentation of International Law*, 25(4) *Michigan Journal of International Law*, 2004, pp. 854-855.
[313] CLARENCE WILFRIED JENKS, *The Conflict of Law-Making Treaties*, 30 *British Yearbook of International Law*, 1953, p. 403 ("[L]aw-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law.").
[314] *See* § I.1.1. As noted by CHRISTIAN LEATHLEY, *An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?*, 40 *International Law and Politics*, 2007, p. 264 ("[R]ecently, globalisation has accelerated the trend of fragmentation and arguably defines the current phase in which international law is situated.").
[315] This formulation was once adopted by the ICJ, *United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran), Judgment, in *ICJ Reports 1980*, dated 24 May 1980, p. 40 ("The rules of diplomatic law, in short, constitute a self-contained régime").

regarded as a starting point, but only as an objective to be achieved through an increasing integration.[316]

On the other hand, it is possible to regard international law as a *corpus iuris* with a coherent normative framework – represented by general international law – which constitutes the common point of reference from which all the various specific branches are inspired.[317]

In recent times, this second conception caught the attention of the International Law Commission, whose Report titled "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", finalized by Martti Koskenniemi, is the point of departure of any research on such issue.[318]

The fundamental purpose of the ILC Report was to identify which techniques could facilitate the consistent application of international law. In doing so, the ILC Report considered the sectoral and regional regimes that have been developed for social and political reasons, in response to the practical need of having clearer and more specific rules in certain fields.

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[316] *See e.g.*, GERHARD HAFNER, *Pros and Cons Ensuing from Fragmentation of International Law*, 25(4) *Michigan Journal of International Law*, 2004, p. 850 ("Presently, there exists no homogeneous system of international law. International law consists of erratic blocks and elements; different partial systems; and universal, regional, or even bilateral subsystems and subsubsystems of different levels of legal integration.")

[317] *See e.g.*, BRUNO SIMMA AND DIRK PULKOWSKI, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17(3) *European Journal of International Law*, 2006, p. 529 (describing the evolution of international law "from a small but organized body of general rules to a spread-out web of normativity" and explaining that "this transformation has been premised on the stability of the systemic framework of the international system as a whole") *See also* ICJ, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, Declaration of Judge Greenwood, in *ICJ Reports 2012*, dated 19 June 2012, p. 394 ("International law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law").

[318] International Law Commission, Report of the Study Group on Fragmentation (finalized by Martti Koskenniemi), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, dated 13 April 2006 (the 'ILC Report').

The focus of the International Law Commission was therefore on the substantial issues arising from fragmentation, looking for the available approaches to decide which rule should be applied in case of conflict.[319]

More specifically, the ILC Report was aimed at evaluating the existing framework to resolve such conflicts – with particular regard to the rules provided by the VCLT – closely considering i) the relationship of specialty (*lex specialis derogat generali*); ii) the chronological relationship (*lex posterior derogat priori*); and iii) the hierarchical relationship (*lex superior derogat inferiori*) between rules.[320]

Hence, the merit of the ILC Report was to highlight possible approaches to the substantial problems caused by fragmentation, which was regarded as a necessary evil to increase the responsiveness of international law to the new regulatory context. The ILC Report clarified that general international law already provided for principles and guidelines to address the negative effects of fragmentation, without any need to figure out new specific instruments.[321]

At the same time, the ILC Report recognized that there was no default and comprehensive answer to the problems linked to the expansion of international law. In fact, it concluded that:

> the emergence of conflicting rules and overlapping legal regimes will undoubtedly create problems of coordination at the international level. But . . . *no homogenous, hierarchical meta-system is realistically available to do away with such problems*.[322]

Following the finalization of the ILC Report, many scholars have focused their research on the issue of fragmentation, using a variety of approaches. Some scholars have

[319] The Commission was not interested in the conflicts between international institutions. *See id.*, para. 13 ("The Commission decided to leave this question aside. The issue of institutional competencies is best dealt with by the institutions themselves. The Commission has instead wished to focus on the substantive question - the splitting up of the law into highly specialized 'boxes' that claim relative autonomy from each other and from the general law.").
[320] *Id.*, para. 18. The ILC Report includes a broad analysis of various systemic approaches to the interpretation of international law, such as the one established by Article 31(3)(c) of the VCLT.
[321] *Id.*, para. 492.
[322] *Id*. (emphasis in original).

suggested that there are basically three points of view with respect to this phenomenon: substantial, institutional, and methodological.[323]

In the first place – in continuity with the analysis thoroughly carried out in the ILC Report – a number of authors have directed their attention on the consequences that fragmentation has in terms of substance, whenever it is necessary to establish which norms are applicable. This is particularly complicated in those situations in which multiple overlapping treaties are at stake or when a set of general rules is to be applied in different subject-matters. However, the conclusions have been generally in line with the ILC Report, at least with respect to the availability of already existing solutions.[324]

From the institutional point of view, the focus has been placed on the role of international courts and tribunals, as detailed in the following section. However, it is also worth noting that other organs at the international level – even if they do not exactly carry out a judicial function within the meaning specified above[325] – might have regulatory powers whose coordination has given rise to fragmentation issues. As scholars have noted, this chaos might favor powerful States at the expense of weaker States and thus risk to "sabotage the evolution of a more democratic and egalitarian international regulatory system."[326]

Finally, from another point of view, fragmentation relates also to the methodological aspects of the study and the application of international law. Clearly, the idea that the fields of international law are separate and independent branches, subject to the jurisdiction of autonomous and isolated bodies, entails that those who interpret international norms would be encouraged to develop different approaches to explain the

[323] MADS ANDENAS AND EIRIK BJORGE (Eds*.), A Farewell to Fragmentation : Reassertion and Convergence in International Law*, Cambridge 2015, pp. 4-12.
[324] RALF MICHAELS AND JOOST PAUWELYN, *Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law*, 22 *Duke Journal of Comparative and International Law*, 2011 pp. 349 ff. (suggesting an alternative approach based on the idea that private international law solutions can be applied on public international law conflicts.).
[325] *See* § II.1.2.
[326] EYAL BENVENISTI AND GEORGE W. DOWNS, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60(2) *Stanford Law Review*, 2007, p. 597.

meaning of international law provisions.[327] In other words, even when the text of the relevant provisions is identical and the risk of conflict would be theoretically excluded, it is still very much possible to interpret them in a different way. The risk is that these divergent means of interpretation may further drift apart the manifold regimes of international law.

2.2. The Proliferation of International Courts and Tribunals

Arguably, one of the most significant aspects of fragmentation relates to the impact that the international judiciary had on this phenomenon, with particular regard to the consequences stemming from the existence of a plurality of jurisdictions in the international legal order, including recently established institutions.[328]

From this perspective, starting from the end of the Cold War, there has unquestionably been a proliferation of international courts and tribunals.[329] Most of them has effectively been exercising a judicial function, because such bodies generally fall into the criteria that were illustrated above, both in connection with the nature of the disputes adjudicated– not merely hypothetical and international – and the nature of the decisions issued – based on legal rules and binding upon the parties.

An obvious example is the International Tribunal for the Law of the Sea ('ITLOS'), established under the United Nations Convention on the Law of the Sea ('UNCLOS'), which began operating in 1996.[330] This independent judicial body has jurisdiction over the disputes arising under the UNCLOS as well as under other 12

[327] MADS ANDENAS AND EIRIK BJORGE (Eds*.), A Farewell to Fragmentation : Reassertion and Convergence in International Law*, Cambridge 2015, pp. 8 ff.
[328] In this regard, *see* extensively TULLIO TREVES, *Fragmentation of International Law: The Judicial Perspective*, 23 *Comunicazioni e Studi*, 2007.
[329] See, among the others, KAREN J. ALTER, *The Multiplication of International Courts and Tribunals After the End of the Cold War*, in CESARE PR ROMANO, KAREN J. ALTER, YUVAL SHANY (Eds.), *The Oxford Handbook of International Adjudication*, Oxford 2014, pp. 64 ff.; KARIN OELLERS-FRAHM, *Proliferation*, in WILLIAM A. SCHABAS AND SHANNONBROOKE MURPHY (Eds.), *Research Handbook on International Courts and Tribunals*, Cheletenham 2017, pp. 299 ff.; ROGER P. ALFORD, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 *American Society of International Law Proceedings*, 2000, pp. 160 ff.
[330] United Nations Convention on the Law of the Sea, 1833 UNTS 397, dated 10 December 1982, Article 287.

multilateral agreements and has emerged as the highest authority with respect to issues concerning the law of the sea.[331]

Another example that illustrates this point concerns the development of international criminal courts, which assess the responsibility of individuals for the violation of some of international law's most prominent rules. At an initial stage, a number of *ad hoc* tribunals were established as a result of UN Security Council resolutions.[332] Subsequently, the Treaty of Rome was signed, setting up the International Criminal Court, a standing permanent body, representing the international community as a whole, with jurisdiction over genocide, crimes against humanity, war crimes, and acts of aggression.[333] Notwithstanding their central importance, international criminal courts are sometimes considered different and separated from other international adjudicating bodies because they do not necessarily require the involvement of a State as a party to the proceedings.[334]

At the same time, the establishment of new international adjudicating bodies was not an isolated phenomenon. Indeed, the recourse to mechanisms that were already available since the end of the Second World War had become increasingly more frequent. For instance, arbitral tribunals in the field of the protection of foreign investment, as will be further explained in the next chapter, have flourished at the beginning of the new millennium, notwithstanding the fact that the Investor-State Dispute Settlement system had already been in place for a very long time.[335]

Other organs tasked with the adjudication of disputes underwent major changes, such as in the case of the European Court of Human Rights, which in 1998 became a

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[331] SHIRLEY V. SCOTT, *The LOS Convention as a Constitutional Regime for the Oceans*, in ALEX G. OUDE ELFERINK, *Stability And Change in the Law of the Sea: The Role of the Los Convention*, Leiden and Boston 2005, pp. 14 ff. (recognizing the emergence of a system of governance in the UNCLOS regime).

[332] United Nations Security Council Resolution 827 (1993), UN Doc. S/RES/827 (1993), dated 25 May 1993 (establishing the International Criminal Tribunal for the former Yugoslavia); United Nations Security Council Resolution 955 (1994), UN Doc. S/RES/955 (1994), dated 8 November 1994 (establishing the International Criminal Tribunal for Rwanda).

[333] Rome Statute of the International Criminal Court, 2187 UNTS 90, dated 17 July 1998 ('Rome Statute'), Article 5.

[334] *See* § II.1.2.

[335] *See* § III.1.1.

permanent institution directly accessible to private individuals.[336] Likewise, as mentioned in the first chapter, the dispute settlement system of the WTO was revolutionized in 1994 with the Marrakesh Agreement, acquiring characteristics which are typical of a judicial body.[337]

Thus, the role of those institutions must be duly considered when referring to the proliferation of judicial bodies, since the plurality of international jurisdictions – nowadays more and more often regarded as an international judiciary – does not merely account for newly established courts and tribunals, but also for the renovation and revitalization of existing ones.

In any event, each adjudicating body operates in a basically closed system, part of the fragmenting patterns described in the previous paragraphs. As noted by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia ('ICTY'):

> International law, because it lacks a centralised structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralised or vested in one of them but not the others. In international law, every tribunal is a self-contained system.[338]

As could be expected, many difficulties have arisen in the coordination of arbitral and judicial proceedings, given the presence of such many *fora*. At various times,

[336] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, entered into force on 1 November 1998, abolished the filter of the European Commission of Human Rights, thus allowing individual recourses to be heard without the need of a previous assessment made by the Commission.

[337] *See* § I.1.2.

[338] ICTY, Appeals Chamber, *Prosecutor v. Tadic*, Case IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, dated 2 October 1995, para. 11. *See also*, more recently, Special Tribunal for Lebanon, Appeals Chamber, *Prosecutor v. El Sayed*, Decision on Appeal of pre-trial Judge's Order Regarding Jurisdiction and Standing, dated 10 November 2010, para 41 ("Indeed, each tribunal constitutes a self-contained unit or, as has been said, 'a monad that is very inward-looking' or 'a kind of unicellular organism'").

members of the ICJ have warned the international community of the risks surrounding the proliferation of international courts and tribunals.[339]

2.3 Fragmented Jurisdictions and Fragmented Jurisprudence

The most evident of such risks consists in the possibility that the same subject-matter is adjudicated by different courts, which may not be a rare occurrence given the number of competing institutions. As simply noted by William Schabas, it is "inevitable that there will be overlaps in jurisdiction where several courts operate simultaneously."[340]

In this regard, two concurrent perspectives must be taken into account.[341] On the one hand, there is the legitimate expectation of the parties to a dispute to obtain a final decision at the end of a single proceeding, in order to limit the costs of litigation, including the social and political consequences of the dispute. This is particularly true in the case of the prevailing party, which does not want that the decision could be hindered by other inconsistent rulings. On the other hand, there is a systemic interest not to undermine the stability and the credibility of the international law system as a whole, by allowing proceedings, sometimes initiated by the same party, to be conducted in parallel and, potentially, to reach inconsistent decisions.

The *MOX Plant* case represents a perfect example of this situation, incidentally showing the level of sophistication of international dispute-resolution, as recognized by the same ILC Report.[342] In that circumstance, three international adjudicating bodies were

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[339] *See e.g.*, ROBERT JENNINGS, President of the International Court of Justice, *Speech to the General Assembly of the United Nations*, dated 15 October 1993, *available at* www.icj-cij.org ("The relationship of these tribunals to each other and to each other's jurisdiction, and their respective contributions to the directions taken by the development of international law by the resulting case law from their decisions, raise interesting and difficult questions"). Such warnings were dismissed as "postmodern anxieties" by MARTTI KOSKENNIEMI AND PAIVI LEINO, *Fragmentation of International Law? Postmodern Anxieties*, 15 *Leiden Journal of International Law*, 2002, pp. 553 ff. (defining fragmentation as "an institutional expression of political pluralism internationally").

[340] WILLIAM A. SCHABAS, *Introduction*, in WILLIAM A. SCHABAS AND SHANNONBROOKE MURPHY (Eds.), *Research Handbook on International Courts and Tribunals*, Cheletenham 2017, p. 31.

[341] JOOST PAUWELYN AND LUIZ EDUARDO SALLES, *Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42(1) *Cornell International Law Journal*, 2009, pp. 79 ff.

[342] ILC Report, para. 10.

involved in a dispute between the same parties – the United Kingdom and the Republic of Ireland – over the same issue: the construction of a facility to produce mixed oxide fuel, a fissile material derived from radioactive elements. In addition, a fourth proceeding in front of the CJEU arose as a result of such complex litigation.

Starting from the beginning of the 90s, Ireland was dissatisfied with the construction of the MOX Plant carried out in the UK, on account of environmental concerns with respect of the Irish territorial sea. These concerns prompted extensive discussions between the two parties, which were addressed taking also into account the framework of European Community law.[343]

In 2001, Ireland decided to initiate proceedings against the UK under the Convention for the Protection of the Marine Environment of the North-East Atlantic, based on the lack of disclosure of proper information on the activities to be performed at the MOX Plant, which were likely to endanger the maritime area.[344]

Shortly after, before the arbitral tribunal established under the latter convention could have decided the case, Ireland brought a second proceeding against the UK pursuant to the UNCLOS. The claim was premised on the lack of co-operation in the protection of the environment and the absence of an environmental impact assessment.[345] The case was to be discussed in front of an *ad hoc* arbitral tribunal, as provided by Annex VII of the UNCLOS.

Immediately after the filing of this claim, Ireland filed with the ITLOS a request for provisional measures to prevent the UK from starting the operation of the MOX Plant until a decision on the merits had been reached by the Annex VII Arbitral Tribunal, which was still to be constituted.[346]

[343] For a factual background of the dispute, taking into account its various ramifications, *see* ROBIN R. CHURCHILL, *MOX Plant Arbitration and Cases*, in RÜDIGER WOLFRUM (Ed.), *Max Planck Encyclopedia of Public International Law*, Oxford 2010.
[344] *Id.*
[345] *Id.*
[346] *Id.*

The request to prevent the operation of the plant was declined, while the ITLOS issued – as a provisional measure – an order requiring the parties to enter consultations to resolve their dispute and exchange information.[347]

Subsequently, the first proceeding under the Convention for the Protection of the Marine Environment of the North-East Atlantic was dismissed because the arbitral tribunal found out that the UK had not violated any provision of such convention.[348]

In the meantime, European institutions were not inclined to let a dispute involving the application of European law to be decided by a judicial body other than the CJEU. The Annex VII Arbitral Tribunal decided to suspend the merits proceedings on account of this concern.[349] Shortly after, the CJEU was in fact seized of such issues by the European Commission.[350]

Ultimately, the CJEU upheld the position of the European Commission, stating that, as a consequence of Ireland's conducts, "the autonomy of the Community legal system may be adversely affected."[351] Ireland was therefore forced to withdraw its claim from the arbitral tribunal instituted under Annex VII of the UNCLOS.[352]

The dynamic of this case suggests that the existence of multiple remedies have come to be an involuntary burden upon the parties. The same subject-matter was discussed in front of three different courts, each with its own procedural framework and approach. The result was that, even where substantial norms were similar, each court

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[347] ITLOS, *MOX Plant Case (Ireland v United Kingdom)*, Provisional Measures, Order, ITLOS Reports 2001, dated 3 December 2001.
[348] *Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v United Kingdom)*, Final Award, dated 2 July 2003.
[349] *MOX Plant Case (Ireland v United Kingdom)*, PCA Case 2002-01, Order No. 3, Suspension of Proceedings on Jurisdiction and Merits and Request for Further Provisional measures, dated 24 June 2003.
[350] ROBIN R. CHURCHILL, *MOX Plant Arbitration and Cases*, in RÜDIGER WOLFRUM (Ed.), *Max Planck Encyclopedia of Public International Law*, Oxford 2010.
[351] CJEU, Grand Chamber, Case C-459/03, *Commission of the European Communities v. Ireland*, Judgment, dated 30 May 2006, para. 154. *See* NIKOLAOS LAVRANOS, *Protecting Its Exclusive Jurisdiction: The Mox Plant-Judgment of the ECJ*, 5(3) *Law and Practice of International Courts and Tribunals*, 2006, pp. 479 ff. *See also* § III.2.2.
[352] *MOX Plant Case (Ireland v United Kingdom)*, Order No. 6, Termination of the Proceedings, dated 6 June 2006.

could have reached a different conclusion, as the interpretation of such rules varied from court to court.[353]

As a matter of fact, it is crucial to note that courts and tribunals are tasked with the interpretation of the law, but they frequently end up creating their own laws, especially in a system such as international law.[354]

Indeed, adjudicating institutions do not simply have a declaratory function. Whenever it is necessary to go beyond what the law specifically provides, they have an extensive constitutive function. This is a common feature of any organ conceived for the administration of justice and was noted even in the ancient times.[355]

With specific reference to international law, Sir Humphrey Waldock stated that once "the judicial function is admitted in any legal system, it operates, even if within narrow limits, as a creative source of law."[356] This is especially true in the context of international law, where no comprehensive legislative body, capable of promptly addressing its voids and shortcomings, exists. [357] In this regard, it must be noted that establishing a new rule of international law – through a treaty or a custom – normally requires a substantial amount of time and the efforts of many different subjects. Thus, judges are constantly required to refine and supplement what is actually missing in the

[353] ITLOS, *MOX Plant Case (Ireland v United Kingdom)*, Provisional Measures, Order, ITLOS Reports 2001, dated 3 December 2001, para. 51 ("The application of international law rules on interpretation of treaties to identical or similar provisions of different treaties may not yield the same results, having regard to, *inter alia*, differences in the respective contexts, objects and purposes, subsequent practice of parties and *travaux préparatoires*.")

[354] For an examination of the contribution of international adjudicative bodies to lawmaking *see* ARMIN VON BOGDANDY AND INGO VENZKE, *The Spell of Precedents: Lawmaking by International Courts and Tribunals*, in CESARE PR ROMANO, KAREN J. ALTER, YUVAL SHANY (Eds.), *The Oxford Handbook of International Adjudication*, Oxford 2014, pp. 504 ff.

[355] Cicero already affirmed that "The judge is a talking law, while the law is a silent judge" to account the fundamental role of those having the power to interpret and apply the law. CICERO, *De Legibus*. Georges de Plinval (ed.), Paris 1959, III.2 ("[M]agistratum esse legem loquentem, legem autem mutum magistratum").

[356] HUMPHREY M. WALDOCK, *General Course on Public International Law*, 106 *Recueil Des Cours*, 1962, p. 95.

[357] MOHAMMED BEDJAOUI, President of the International Court of Justice, *Statement Made in Plenary Meeting at the General Assembly at its 51st Session*, dated 15 October 1996, *available at* www.icj-cij.org, p. 6 ("The function of the courts consists, precisely, in translating the law into action by imbuing themselves with its spirit, by applying its general precepts, with wisdom and discernment, to the particular eventualities, and, in cases which it has not resolved, by completing the law through 'doctrinal' interpretation. The administration of justice would clearly be impossible if courts were to refrain from ruling whenever the law is obscure or incomplete.")

applicable law and so are arbitrators, considering the importance of arbitration in the resolution of international disputes.[358]

Having in mind two famous adages, it could be said that rather than being a mere "*bouche de la loi*" the international judiciary is the ultimate party responsible to say what international law is.[359]

This paradigmatic feature of adjudicating bodies has eventually emerged as a challenge for the international law domain because it constitutes an obstacle to the legal certainty and coherence of the legal order.

Indeed, given the proliferation of international courts and tribunals, many of which operate in the same field, there is a strong risk that different interpretations of the same or similar rules could be applied to the same or similar set of circumstances. In addition, the absence of a hierarchical system ordinarily prevents such conflicts to be resolved by a higher authority.[360] Besides, the problem is not limited to the international judiciary, because domestic courts are also actively engaged in the interpretation of international norms.[361]

The best way to clarify the nature of this problem is to refer to the most famous cases of divergent interpretations. Notably, the critical issue of the attribution to States of private groups' actions has originated a harsh contrast between the views taken by the ICJ and those supported by the Appeals Chamber of the ICTY.

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[358] With respect to the role of international arbitration in this regard, *see* DOLORES BENTOLILA, *Arbitrators as Lawmakers*, Alphen aan den Rijn 2017.

[359] CHRISTIAN J. TAMS, *The World Court's Role in the International Law-Making Process*, in JOST DELBRÜCK ET AL. (Eds.), *Aus Kiel in die Welt: Kiel's Contribution to International Law. Essays in Honour of the 100th Anniversary of the Walther Schücking Institute for International Law*, Berlin 2013 (reporting the two opposing views of the Baron de Montesquieu and US Supreme Court judge Charles Hughes).

[360] As will be explained elsewhere in this thesis, this is certainly the case of investment arbitration, bearing in mind that the contrast is not limited to the case law of arbitral tribunals, but often encompass issues that are generally approached in a different way by other international courts and tribunals, such as the issue of reflective loss claims. *See* § III.1.3.

[361] As a matter of fact, some authors believe that domestic courts are an important driver of the consistency of the international legal order. See, *e.g.*, JEAN D'ASPREMONT, *The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order*, in OLE K. FAUCHALD AND ANDRÉ NOLLKAEMPER (Eds.), *The Practice of International and National Courts and the (De-)Fragmentation of International Law*, Oxford 2012, pp. 141 ff.

In the *Nicaragua* case, the ICJ was required to decide whether the actions of the *contras* – the military organizations of rebels set up against the Marxist Government of Nicaragua – could be attributed to the US. These groups, which were helped and trained by US military forces, had engaged in serious violations of humanitarian law and Nicaragua held the US accountable for violations committed in the course of their military and paramilitary operations.[362] The World Court took the opposite view, stating that there was no evidence that the US had "effective control" of such operations.[363] The great deal of assistance given by the US to the *contras* did not mean that they had "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law," which could have been carried out by the rebels even in the absence of the control of the US.[364]

In the *Tadic* case, the ICTY was required to decide whether the conflict between Bosnian Serb forces and Bosnia and Herzegovina was an international armed conflict, which in turn would have triggered the jurisdiction of the court on the basis of its Statute.[365] Contrary to the decision of the Trial Chamber, the Appeals Chamber affirmed that such conflict had an international nature because the actions of the Bosnian Serb forces were attributable to the former Yugoslavia.[366] In order to reach this decision, the Appeals Chamber disregarded the effective control test proposed by the ICJ and relied on the notion of "overall control."[367] In the opinion of the Appeals Chamber, an organized group that is, as a whole, under the control of the State, "engage the responsibility of that State for its activities, *whether or not each of them was specifically imposed, requested or directed by the State*."[368]

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[362] ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, in *ICJ Reports 1986*, dated 27 June 1986, para. 15.
[363] *Id.*, para. 115.
[364] *Id.*
[365] ICTY, Appeals Chamber, *Prosecutor v. Tadic*, Case IT-94-1-A, Judgment, dated 15 July 1999, paras. 83-87.
[366] *Id.*, para. 162.
[367] *Id.*, para. 120.
[368] *Id.*, para. 122 (emphasis in original).

While there have been attempts to explain why these two approaches differ based on the different aims pursued by the ICJ and the ICTY,[369] this contrast has undoubtedly sparked off a fervid discussion over the issue of accountability.[370]

Putting aside the merit of their reasoning, the relevant point for our purposes is that two independent courts acting in different fields may reach a divergent solution with respect to similar legal issues.[371]

At first glance, this situation could surely represent a risk for international law, possibly undermining any legal certainty. Thus, President Guillame specifically put the emphasis on the fact that:

> the proliferation of international courts gives rise to a serious risk of conflicting jurisprudence, as the same rule of law might be given different interpretations in different cases. This is a particularly acute risk, as we are dealing with specialized courts that are inclined to favour their own disciplines. . . Judges themselves must realize the danger of fragmentation in the law, and even conflicts of case-law, born of the proliferation of courts.[372]

In conclusion, the risk is that multiple courts and tribunals can exacerbate the fragmentation of international law. In addition, such circumstance could also be amplified by the fact that courts are often asked to create the law, rather than merely applying it to

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[369] KATHERINE DEL MAR, *The Requirement of 'Belonging' under International Humanitarian Law*, 21(1) *European Journal of International Law*, 2010, p. 124 ("[B]efore calling into question the universality of international law, and arguing that it is fragmented, it may be preferable first to examine whether different legal tests serve different purposes."). *See also* ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, in *ICJ Reports 2007*, dated 26 February 2007, para. 405 ("It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature").

[370] ANTONIO CASSESE, *The* Nicaragua *and* Tadić *Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18(4) *European Journal of International Law*, 2007, pp. 649 ff; ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, in *ICJ Reports 2007*, dated 26 February 2007, paras. 406-407 (stating that the overall control test "stretches too far . . . the connection which must exist between the conduct of a State's organs and its international responsibility" and adopting the effective control test").

[371] In addition, it should be noted that this situation may similarly occur when the institutions are acting within a homogenous framework, as will be discussed below with respect to the field of investment arbitration. *See* § III.1.3.

[372] GILBERT GUILLAUME, President of the International Court of Justice, *Speech to the General Assembly of the United Nations*, dated 30 October 2001, *available at* www.icj-cij.org.

a specific set of facts, thus issuing diverging decisions which often apply to the same legal issue.

Such warnings have been often put aside because they would have constituted an overstatement of the situation. For instance, Anne Peters has expressed the view that:

> Although the lack of a central lawmaker has (inevitably) led to the existence of multiple legal regimes with overlapping but not identical memberships, whose main objectives often stand in tension, the law-appliers (both treaty bodies and court) are careful not to contradict each other. The actual instances of completely irreconcilable norms and case-law or of divergent interpretations of cross-cutting norms by different courts and tribunals have been exceedingly rare.[373]

In this context, scholars have emphasized the emergence of transversal judicial techniques aimed at mitigating the problems linked to the proliferation of international courts and tribunals, which will be discussed in the following section.

[373] ANNE PETERS, *Constitutional Fragments: On The Interaction of Constitutionalization and Fragmentation in International Law*, Working Paper No. 2, University of St. Andrews, 2015. *See*, however, the analysis of the visible fragmenting patterns in the investment law regime carried out in § III.1.3.

3. The Development of Transversal Judicial Techniques to Mitigate the Problems of Fragmentation

3.1. International Procedural Law: Issues Related to the Application of Domestic Solutions

The exercise of a judicial function is a common element of both international and domestic legal orders, given the absolute necessity of deciding disputes and avoiding conflicts between the members that comprise their respective communities. As mentioned above, Nation-States have established a complex apparatus to perform this task, made up by different kinds of courts.[374]

Even in the internal context – *a fortiori*, in fact – fragmentation has always been perceived as an undesirable phenomenon, in light of considerations concerning the unity of the legal order and the rule of law, recalling those mentioned within the international law discourse.

Hence, a number of legal instruments was developed – both in common law and civil law systems – precisely to avoid the problem of the overlapping jurisdictions of different judicial bodies, which could in turn lower the risk of fragmentation.

It was only natural that international courts and tribunals – anticipating the scholars studying such issues[375] – would adopt the systems that had proven to be reasonably effective, at least within the domestic context.

The most prominent among these mechanisms is the doctrine of *res iudicata* which responds to the "principle inherent in all judicial systems which provides that an earlier adjudication is conclusive in a second suit involving the same subject matter and

[374] *See* § II.1.1.

[375] *See inter alia* LAURENCE BOISSON DE CHAZOURNES, *Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach*, 28(1) *European Journal of International Law*, 2017, pp. 13 ff.; JOOST PAUWELYN AND LUIZ EDUARDO SALLES, *Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42(1) *Cornell International Law Journal*, 2009, pp. 85 ff; YUVAL SHANY, *The Competing Jurisdictions of International Courts and Tribunals*, New York 2004.

the same legal bases."[376] Therefore, such mechanism applies only to sequential proceedings, whenever a decision has been already issued.

The rule of *res iudicata* has been enshrined in international treaties setting up adjudicating bodies and was found to constitute a general principle of international law.[377] It has also tentatively been applied by international courts and tribunals with respect to decisions taken by other arbitral or judicial institutions.[378]

Nevertheless, its application has not always been straight-forward.[379] For instance, a much-debated aspect of *res iudicata*, which has given rise to intense discussion even in the domestic context, concerns its effect on incidental questions decided by a court or tribunal. In this regard, the ICJ has specified that *res iudicata* applies even when a matter has been decided not expressly but "by necessary implication."[380]

On the contrary, there is a substantial agreement regarding the requirements for the application of the rule of *res iudicata*. In particular, the parties, the object, and the cause of action of the legal proceedings must be identical.[381]

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[376] PETER R. BARNETT, *Res Judicata, Estoppel, and Foreign Judgments*, New York 2001.

[377] For instance, Article 59 of the ICJ Statute defines the *res iudicata* effect of ICJ judgments on the merits in a negative way, by excluding any consequence of a ruling beyond the particular case decided. ICJ Statute, Article 59 ("The decision of the Court has no binding force except between the parties and in respect of that particular case.").

[378] *See* PCIJ, *Societé commerciale de Belgique (Socobelge) (Belgium v. Greece)*, Judgment, PCIJ Series (1939), dated 15 June 1939, para. 63 ("Recognition of an award as res judicata means nothing else than recognition of the fact that the terms of that award are definitive and obligatory.").

[379] *See* JENNIFER HILLMAN, *Conflicts Between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO — What Should WTO Do?*, 42 *Cornell International Law Journal*, 2009, pp. 193 ff. (describing the *Brazil Tyres* case, where the decision of the WTO Appellate Body superseded a precedent ruling of the tribunal of the Mercado Comin del Sur (MERCOSUR), a regional trade agreement).

[380] ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, in *ICJ Reports 2007*, dated 26 February 2007, paras. 126, 132 (recognizing that a finding on jurisdiction *ratione personae* was implicitly required in order to issue a previous decision in 1996). For an extensive analysis of the ICJ case law in this regard, taking into account recent developments, *see* NICCOLÒ RIDI, *Precarious Finality? Reflections on* Res Judicata *and the* Question of the Delimitation of the Continental Shelf *Case*, 31(2) *Leiden Journal of International Law*, 2018, pp. 383 ff.

[381] PCIJ, *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory) (Germany v. Poland)*, Dissenting Opinion of Judge Anzilotti, PCIJ Series (1927), dated 16 December 1927, para. 57.

No matter how clear these conditions are at a domestic level, they may often cause problems when employed in the context of international law. More specifically, it is difficult to apply the requisite in relation to the so-called *causa petendi*, since the jurisdiction of competing international courts and tribunals is generally grounded on separate instruments, that can be the basis of different challenges to a certain conduct.[382] Therefore, the cause of action of international disputes is often based on different instruments, while the substance and legal grounds could be the same.

The same issue arises when the principle underlying the doctrine of *res judicata* is applied in the context of proceedings that are still ongoing.

With respect to such parallel proceedings, most civil law countries adopt the *lis alibi pendens* principle to determine which court has to decide the dispute.[383] In essence, the court or tribunal that has been seized first will continue in the process of adjudication, while the other ones must stay their proceedings, waiting for a final decision to be issued by the first court.

As in the case of *res iudicata*, this principle will be hardly taken into account if a case is in front of two bodies whose jurisdiction is affirmed by different treaties,[384] unless the same requirements are applied in a less rigid way.[385] Besides, the two bodies would always be acting within different systems, regulated by different treaties. Therefore, their

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[382] As will be mentioned below, another problem that emerged within investment arbitration cases is the possibility that multiple proceedings may be brought by only formally different parties, hidden behind the corporate veil. *See* § III.1.3. *See also CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, dated 13 September 2001; *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, dated 3 September 2001.

[383] On the origins of *lis pendens* and its application in the international context, *see* CAMPBELL MCLACHLAN, *Lis Pendens in International Litigation*, 336 *Collected Courses of the Hague Academy of International Law*, 2009, pp. 48 ff.

[384] *See* CAROLINE HENCKELS, *Overcoming Jurisdictional Isolationism at the WTO – FTA Nexus: A Potential Approach for the WTO*, 19(3) *European Journal of International Law*, 2008, p. 576 (commenting the *Mexico – Soft Drinks* case, where the WTO Appellate Body refused to decline its jurisdiction, even though an arbitral tribunal was already tasked with the resolution of a larger dispute between the United States and Mexico).

[385] Less rigid standards were proposed by AUGUST REINISCH, *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, 3 *The Law and Practice of International Courts and Tribunals*, 2004, p. 72 ("Instead of rigid identity tests, an overall assessment of the parties involved, the legal grounds invoked, the objects pursued and the underlying facts will be necessary in order to avoid a multiplication of proceedings with its inherent danger of conflicting outcomes.")

situation is not comparable to the one of two civil law courts operating within the same domestic jurisdiction and tasked with the decision of the same case.

Likewise, the procedural instrument used in common law countries to avoid parallel proceedings, the *forum non conveniens* doctrine, is not usually considered as an available solution in the international context.[386]

This rule presupposes that another judicial body is in a better place to decide a given dispute. Such assessment is made on the basis of criteria that exceed those adopted for jurisdictional purposes, such as the applicable law, the proximity of the evidence and of the witnesses, and other similar aspects. These criteria often allow to establish whether one of the parties is trying to overcomplicate the litigation of the dispute for the other, by taking legal action in a particular *forum*.

From this point of view, it would be difficult to understand which jurisdiction is more appropriate within the framework of international litigation. As a matter of fact, international adjudicating bodies have their seat in neutral locations while evidence and witnesses often play a less important role than in domestic cases. Besides, the issue to be resolved is not the mere use of "guerrilla tactics" by the parties, but the inordinate fragmentation of jurisdictions and could not be left to the discretion of judges, as it would happen by applying the doctrine of *forum non conveniens*.[387]

Against this background, the best solution would be to regulate these conflicts directly in the treaties that establish judicial or arbitral bodies, as private parties do in contracts regulating the litigation of disputes.

Possibly, an example that may illustrate this point is the UNCLOS, which has introduced the principle of compulsoriness of dispute settlement and has provided for specific rules to manage conflict between different bodies of adjudication, even when they are established by different treaties.[388]

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[386] JOOST PAUWELYN AND LUIZ EDUARDO SALLES, *Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42(1) *Cornell International Law Journal*, 2009, p. 110.
[387] *Id.*, p. 112.
[388] UNCLOS, Articles 281-283.

However, even within this framework, there have been conflicts in the interpretation of the relevant rules, which have led to conflicting decisions on the part of the ITLOS and an *ad hoc* arbitral tribunal tasked to resolve a dispute between Australia, New Zeland and Japan.[389]

To a large extent, the difficulty in applying the principles in relation to the cases of overlapping jurisdictions lies in the consensual nature of international litigation, as described above. General rules such as *lis pendens* or *forum non conveniens*, but also specific ones such as those established in the relevant treaties, clash with the principle that it is always necessary to identify the intention of the parties as to which dispute settlement mechanism they wanted to apply.[390]

Given this complexity, the remaining option would be to refer these situations to the reasonableness of international courts and tribunals and rely on their mutual respect based on the common membership to the same community. [391]

As noted in the *MOX Plant* case recalled above, international courts and tribunals shall:

> Bear[] in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States.[392]

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[389] CESARE ROMANO, *The* Southern Bluefin Tuna *Dispute: Hints of a World to Come . . . Like It or Not*, 32 *Ocean Development and International Law*, 2001, p. 313 (discussing the *Southern Bluefin Tuna* case).

[390] This is why several commentators have tried to adapt these principles to the peculiar nature of international law. *See e.g.*¸ JOOST PAUWELYN AND LUIZ EDUARDO SALLES, *Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42(1) *Cornell International Law Journal*, 2009, pp. 113 (proposing the approach of looking for *le juge natural*, largely based on the *forum non conveniens* approach).

[391] ANNE-MARIE SLAUGHTER, *A Global Community of Courts*, 44(1) *Harvard International Law Journal*, 2003, p. 206 ("Judicial comity provides the framework and the ground-rules for a global dialogue among judges in the context of specific cases."). *See also* THOMAS SCHULTZ AND NICCOLÒ RIDI, *Comity and International Courts and Tribunals*, 50 *Cornell International Law Journal*, 2017, pp. 577 ff.

[392] *MOX Plant Case (Ireland v United Kingdom)*, PCA Case 2002-01, Order No. 3, Suspension of Proceedings on Jurisdiction and Merits and Request for Further Provisional measures, dated 24 June 2003, para. 28. *See also*, in the context of investment law disputes, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction, dated 14 April 1988, para. 56 ("[I]n the interest of international judicial order,

3.2. Cross-Fertilization and Judicial Dialogue

In addition to the problem of overlapping jurisdictions, a separate issue concerns the possible contrasts that can be found in the case law of international courts and tribunals, as already mentioned above.

In this regard, the mere coordination that can be realized through procedural tools is not enough. The harmonization of the system is achievable only as a result of a better and strengthened interaction between adjudicating bodies.

A first step towards the uniformity in the interpretation of international rules is represented by the reference to the jurisprudence of other organs, made by certain judges and arbitrators in their decisions.

As a general rule, international litigation does not recognize the *stare decisis* principle, which is applied by common law courts.

In fact, a judicial body is usually not even bound by previous decisions that it has taken in the past, outside the limited scope of the rule of *res iudicata*, as seen above. Thus, it is not conceivable that an institution which is part of a given system should be under an obligation to follow a precedent established outside the same system when deciding a certain case.[393] Ultimately, it would be hard to find a legal reason to justify such a principle, given the extreme heterogeneity of dispute-resolution mechanisms.

However, this does not exclude that the courts may "borrow" from each other's case law to decide a dispute, whenever they feel the need to find other supporting arguments.[394] As Judge Greenwood affirmed in the *Ahmadou Sadio Diallo* case:

> each international court can, and should, draw on the jurisprudence of other international courts and tribunals, even

either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal.")

[393] For a thorough analysis of the notion of precedent *see* MARC JACOB, *Precedents: Lawmaking Through International Adjudication*, 12(5) *German Law Journal*, 2011, pp. 1005 ff.

[394] ERIK VOETEN, *Borrowing and Nonborrowing among International Courts*, 39(2) *The Journal of Legal Studies*, 2010, pp. 547 ff.

> though it is not bound necessarily to come to the same conclusions.[395]

In that case, the ICJ was almost forced to consider the case law of human rights courts in general, and the ECtHR in particular, with respect to the issue of the quantification of damages, since that problem had almost never come up in ICJ previous decisions.[396]

However, there can be multiple reasons to cite decisions of other adjudicating bodies. Indeed, the reciprocal effect that a citation to an external source may entail should always be considered. On one hand, an arbitrator or a judge may want to look at its peers' pronouncements in order to give a more solid legal foundation to a decision, showing at the same time a deep knowledge of the issue at stake that goes beyond the microcosm of a specific field. On the other hand, the citation triggers the participation of the arbitral or judicial institution to a larger community, being thus instrumental to the possibility of influencing other legal orders.

This explains the diversity in the patterns of citation on the part of the various dispute settlement mechanisms, evidenced by the empirical studies that have dealt with such issue.[397]

At the same time, it means that an external citation is just one of the possible pieces of evidence of the close connection between different courts and tribunals. Indeed, such external citation does not, on its own, exactly prove that an adjudicating body is trying to harmonize its case law with the practice of others. In this sense, it is necessary to understand if the legal reasoning of different courts is actually compatible.[398]

In any event, the implicit or explicit reference to the jurisprudence of another body means that, as opposed to the ordinary situation in which each court "projects the

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[395] ICJ, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, Declaration of Judge Greenwood, in *ICJ Reports 2012*, dated 19 June 2012, p. 394.

[396] *Id.*, para 13 (recalling that the ICJ has fixed an amount of compensation only once before and in its first case, the *Corfu Channel* case.

[397] *See e.g.*, DAMIEN CHARLOTIN, *The Place of Investment Awards and WTO Decisions in International Law: A Citation Analysis*, 20(2) *Journal of International Economic Law*, 2017, pp. 279 ff.

[398] EVA KASSOTI, *Fragmentation and Inter-Judicial Dialogue: The CJEU and the ICJ at the Interface*, 8(2) *European Journal of Legal Studies*, 2015, p. 23.

functional perspectives of the specific regime in which it is embedded onto the law it applies," it is possible that "cross-fertilization does transgress regime borders."[399]

This is particularly common with respect to procedural issues,[400] but it likewise regards more substantial problems, such as in the *Ahmadou Sadio Diallo* case described above.

The extensive literature analyzing this phenomenon has described the citation of external case law as a "monologue."[401] In fact, the body whose decision has been cited may not be aware that another court has used its precedent to fortify its legal reasoning.

From this point of view, judicial dialogue is a slightly different concept that brings a greater interconnectedness between courts and tribunals. A true dialogue between adjudicating bodies does not simply imply the acknowledgement of another institution's case law but it requires that the latter is directly called into question to resolve a certain legal issue.[402]

This type of interaction has become common at the European level, in light of the key importance of the preliminary reference procedure established by Article 267 of the TFEU.[403] Indeed, the judicial dialogue between national courts and the CJEU is recognized as a fundamental ingredient of the integration at the EU level.[404]

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[399] ARMIN VON BOGDANDY AND INGO VENZKE, *The Spell of Precedents: Lawmaking by International Courts and Tribunals*, in CESARE PR ROMANO, KAREN J. ALTER, YUVAL SHANY (Eds.), *The Oxford Handbook of International Adjudication*, Oxford 2014, pp. 517 ff.
[400] CHESTER BROWN, *The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals*, 30 *Loyola of Los Angeles International and Comparative Law Review*, 2008, pp. 219 ff.
[401] *See* the early discussion of this topic by ANNE-MARIE SLAUGHTER, *A Typology of Transjudicial Communication*, 29 *University of Richmond Law Review*, 1994, p. 113.
[402] ANNE-MARIE SLAUGHTER, *A Typology of Transjudicial Communication*, 29 *University of Richmond Law Review*, 1994, p. 113.
[403] *See* § III.2.2.
[404] ANNE-MARIE SLAUGHTER, *A Typology of Transjudicial Communication*, 29 *University of Richmond Law Review*, 1994, p. 115.

However, examples of such an extensive dialogue cannot be found in many other areas of international law, where the international judiciary lacks specific instruments to enhance this kind of cooperation.[405]

From time to time, different proposals have been made to assign to the ICJ a role similar to the one of the CJEU at the European level.[406] As stated by ICJ President Gilbert Guillaume:

> in order to minimize such possibility as may occur of significant conflicting interpretations of international law, there might be virtue in enabling other international tribunals to request advisory opinions of the International Court of Justice on issues of international law that arise in cases before those tribunals.[407]

However, the lack of a political will to pursue these options has made them "unrealistic," at least according to another President of the ICJ.[408]

Again, the central issue appears to be the consensual nature of jurisdiction in international law, which typically poses obstacles to the implementation of possible changes.

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[405] *See* the recently entered force Protocol in the ECHR system, which is based on a similar cooperation between national judges and international courts. *See inter alia* ELISABETTA CRIVELLI, *Il protocollo n. 16 alla CEDU entra in vigore: luci ed ombre del nuovo rinvio interpretativo a Strasburgo*, 3/2018 *Quaderni Costituzionali*, 2018, pp. 719 ff.

[406] *See inter alia* ALICIA FARRELL MILLER, *The Preliminary Reference Procedure of the Court of Justice of the European Communities: A Model for the ICJ*, 32(2) *Hastings International and Comparative Law Review*, 2009 pp. 669 ff,

[407] STEPHEN SCHWEBEL, President of the International Court of Justice, *Speech to the General Assembly of the United Nations*, dated 26 October 1999, *available at* www.icj-cij.org. *See also* GILBERT GUILLAUME, President of the International Court of Justice, *Speech to the General Assembly of the United Nations*, dated 30 October 2001, *available at* www.icj-cij.org. ("A dialogue among judicial bodies is crucial. The International Court of Justice, the principal judicial organ of the United Nations, stands ready to apply itself to this end if it receives the necessary resources.")

[408] ROSALYN HIGGINS, *The ICJ, the ECJ, and the Integrity of International Law*, 52(1) *International and Comparative Law Quarterly*, 2003, pp. 1 ff.

4. Conclusion

This chapter has shown the paramount role of the judicial function in international law, whose fundamental merit was to further the avoidance of the use of force by deciding disputes between opposing parties in a peaceful way.

Although time has not changed its fundamental purpose, the proliferation of dispute settlement mechanisms, particularly after the end of the Cold War, has brought new challenges in this field.

The following statement of prominent ICJ's and ECtHR's judge Gerald Fitzmaurice would seem strange to the modern reader but perfectly describe the paradigm shift of international law.

> Just as in the domestic field it is rare for no court at all to have jurisdiction, and the issue is usually which of two or more possible forums is the correct one. . . conversely, is it a rarity in the international field for there to be any possibility of more than one forum.[409]

In fact, there are currently countless international courts and tribunals and each one is presiding its own "island" in an ever-increasing archipelago, that has become the main driver and example of the international system's fragmentation.[410]

The second section of this chapter has described the most relevant risks arising in this situation. As effectively summarized by Tullio Treves:

> Two kinds of conflicts might develop: conflicts of jurisdiction and conflicts of jurisprudence.[411]

Gradually, international adjudicating bodies have taken part to this twofold competition by deciding more cases and trying to impose their influence on their peers.

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[409] GERALD FITZMAURICE, *The Law and Procedure of the International Court of Justice Volume 2*, Cambridge 1986, p 437.
[410] EYAL BENVENISTI AND GEORGE W. DOWNS, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60(2) *Stanford Law Review*, 2007, p. 599.
[411] TULLIO TREVES, *Conflicts between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31(4) *New York University Journal of International Law and Politics*, 1999, p. 810.

Notwithstanding the above, scholars have pointed out that no irreparable harm has been caused by the fragmentation of the international legal order.[412] At the same time, they have proposed possible solutions to achieve a greater consistency, as outlined in the last section of this chapter. More in general, it could be said that Global Constitutionalism and other academic discourses over the status of international law may constitute a starting point to deal with fragmentation and bring unity in this legal system.[413]

However, among other factors, the distinctive character of international adjudication and its consensual nature have proven to constitute obstacles to implement such solutions.

The following chapter will try to give a practical dimension to the previous considerations, by discussing current issues within international investment law, one of the most active branches of modern international law. The purpose is to highlight its inherent fragmented nature, which has slipped out of almost any form of control and attempt to ensure uniformity.

[412] ANNE PETERS, *The refinement of international law: From fragmentation to regime interaction and politicization*, 15(3) *International Journal of Constitutional Law*, 2017, p. 696.
[413] For an analysis of the relationship between Global Constitutionalism and fragmentation, detailing the complex factors that prevent to address the latter phenomenon, *see* ROSSANA DEPLANO, *Fragmentation and Constitutionalisation of International Law: A Theoretical Inquiry*, 6(1) *European Journal of Legal Studies*, 2013 (recognizing that it is in any case "difficult to envisage a model of legal reasoning that is able to restore the alleged unity of general international law.").

CHAPTER III

THE ACHMEA DECISION: BETWEEN FRAGMENTATION AND CONSTITUTIONALIZATION

Summary: 1. Investment Arbitration: An Overview **1.1** The Development of the Investor-State Dispute Settlement System **1.2** The Critical Discussion Over Investment Arbitration **1.3.** Fragments Within Fragments: The Nature of the Investment Law Regime **2.** The Compatibility of intra-EU Investment Arbitration with EU Law **2.1** Investor-State Dispute Settlement Within the EU Context **2.2.** The Judgment in the *Achmea* Case **2.3.** The Initial Reaction to the *Achmea* Judgment **3.** The Impact of *Achmea* in Perspective **3.21** The Decisions of Arbitral Tribunals after the *Achmea* Judgment **3.3.** The Approach of Domestic Courts **3.1** The Reactions of the European Commission and EU Member States **4.** Conclusion

1. Investment Arbitration: An Overview

1.1 The Development of the Investor-State Dispute Settlement System

As recalled in the introduction of this thesis, the Investor-State Dispute Settlement ('ISDS') system is an alternative dispute resolution mechanism established to resolve disputes between foreign investors and sovereign States over the violations of certain investment protection standards. Basically, ISDS allows private parties to sue States in front of party-appointed arbitration panels, under arbitration clauses provided for in a contract, a domestic law or, – more often – in a treaty.

Historically, the ISDS system replaced diplomatic protection, which had been the predominant approach to foreign investment disputes in earlier times, starting with the modern era.[414]

Indeed, investment opportunities abroad had become more common and easier to manage throughout the 18th and the 19th centuries, but they were still accompanied by high risks, including the idea that the investors' property rights did not receive sufficient

[414] For a comprehensive historical account of investment law *see inter alia* STEPHAN W. SCHILL, CHRISTIAN J. TAMS, RAINER HOFMANN (Eds.), *International Investment Law and History*, Cheltenham and Northampton 2018; BORZU SABAHI ET AL., *International Investment Law and Arbitration: History, Modern Practice, and Future Prospects*, Leiden and Boston 2018; KATE MILES, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*, New York 2013. Significantly, the previous contributions draw on the history of the development of investment law to suggest possible paths of reforms.

protection abroad. In this context, it became established that a State had the possibility to protect its citizens in a foreign country,[415] with particular regard to the wrongful acts for which the redress to the domestic courts of the State hosting the investment did not constitute an effective remedy.[416] While States initially enforced diplomatic protection even through the recourse to the use of force, a well-settled principle currently requires States to take action and resolve these disputes only by peaceful means, such as inter-State arbitral or judicial proceedings.[417]

Thus, whenever an issue in relation to a foreign investment arises, diplomatic protection requires the investor's State of nationality to espouse the investor's claims in order to direct them against the host State.[418] As a matter of fact, the decision to exercise diplomatic protection must be taken exclusively by the State concerned – not by the investor – because the claim belongs to the sovereign entity, albeit fictionally.[419] Ultimately, at a formal level, diplomatic protection results in a dispute between two traditional subjects of public international law, even though one of the parties involved in the underlying dispute is a private party.[420]

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[415] *See* International Law Commission, Draft Articles on Diplomatic Protection, Official Records of the General Assembly, Sixty-first Session, Supplement No. 10, UN Doc. A/61/10, 2006 ('Draft Articles on Diplomatic Protection'), Article 1 ("[D]iplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility."). The Draft Articles on Diplomatic Protection mainly reflect customary international law in this regard as codified by the International Law Commission. *See* extensively CHITTHARANJAN F. AMERASINGHE, *Diplomatic Protection*, Oxford 2008.

[416] Draft Articles on Diplomatic Protection, Articles 14-15 (providing for the rule of the exhaustion of local remedies, which recognizes the possibility for the State hosting the investment to take corrective measures). This principle is also known as the *Calvo doctrine*, by the name of the Argentinian scholar who promoted this idea in the 19th century.

[417] O. THOMAS JOHNSON JR. AND JONATHAN GIMBLETT, *From gunboats to BITs: The evolution of modern international investment law*, in KARL P. SAUVANT (Ed.), *Yearbook on International Investment Law & Policy 2010-2011*, New York 2011, pp. 651-653 (describing the Western powers' attitude in defending the interests of their nationals abroad, even through the use of "gunboat diplomacy," *i.e.* the use of military intervention).

[418] BEN JURATOWITCH, *The Relationship between Diplomatic Protection and Investment Treaties*, 23(1) *ICSID Review - Foreign Investment Law Journal*, 2008, pp. 10 ff.

[419] ANNEMARIEKE VERMEER-KUNZLI, *As If: The Legal Fiction in Diplomatic Protection*, 18(1) *European Journal of International Law*, 2007, pp. 37 ff.

[420] As explained by the PCIJ: "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international

With respect to the substantial protections granted to investments abroad and engaging the responsibility of the host State, adjudicating bodies took the approach that a minimum standard of treatment applied in the context of diplomatic protection, as the following passage from the landmark *Neer* case shows:

> [T]he treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.[421]

For a long time, with very few exceptions, the protection of foreign investments was based on these substantial and procedural guarantees, giving rise to a significant jurisprudence of permanent institutions such as the PCIJ and the ICJ, but also of various arbitral commissions established since the end of the 19th century.[422]

In more recent times, however, the use of diplomatic protection has become increasingly rare, having been replaced by investment treaty arbitration.[423]

More specifically, the international law on foreign investment, as it is known today, came to light only after the end of the Second World War, when capital-exporting countries started signing a new type of bilateral agreements with developing economies.[424] They aimed at regulating on a treaty base such investment protection

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law." PCIJ, *The Mavrommatis Palestine Concessions Case (Greece v. Britain)*, Judgment, in PCIJ Series B No 2 1924, dated 30 August 1924, para. 21.

[421] *L.F.H. Neer and Pauline Neer (United States of America) v. United Mexican States*, Mexico/U.S.A. General Claims Commission, Award, dated 15 October 1926, (1926) 4 RIAA 60, pp. 61-62.

[422] Particularly relevant decisions concern the assessment of the investor's nationality and the set of rights that a State can claim on behalf of its nationals. *See e.g.*, ICJ, *Case Concerning Nottebohm (Liechtenstein v. Guatemala*) Second Phase, Judgment, in *ICJ Reports 1955*, dated 6 April 1955, p. 22 (affirming the principle of effective nationality).

[423] As noted by the ICJ: "the role of diplomatic protection has somewhat faded, as in practice recourse is only made to it in rare cases where treaty regimes do not exist or have proved inoperative." ICJ, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Preliminary Objections, Judgment, in *ICJ Reports 2007*, dated 24 May 2007, para. 88.

[424] The first bilateral investment treaty was signed in 1959. Treaty between the Federal Republic of Germany and Pakistan for the Protection of Investment, dated 25 November 1959. Previously, similar treaties were primarily aimed at favoring commercial relations, not at establishing the protection of foreign investment. KENNETH J. VANDEVELDE, *A Brief History of International Investment Agreements*, 12(1) *U.C. Davis Journal of International Law and Policy*, 2005, pp. 158-161.

standards that were originally provided at custom, including, for instance, the protection from expropriatory measures against the investors' property.[425] Therefore, contrary to the previous regime, the operation of such clauses was limited to the States parties to that specific treaty.[426]

This is why – while other areas of international law evolved on a multilateral basis, such as in the case of international trade law – investment law has remained mainly regulated by a network of bilateral investment treaties ('BITs'), whose number increased sharply throughout the years.[427] There are also several regional or sectoral investment agreements, but none of them has a general and universal scope, at least when compared to the WTO framework.[428]

Besides establishing substantial obligations upon the States, these international investment agreements ('IIAs') also started including rules detailing the available procedures to enforce such obligations. Perhaps inspired by commercial arbitration,[429] the parties to such IIAs provided for the arbitrability of disputes relating to an investment directly between investors and sovereign States. In such a manner, States were granting private parties an autonomous cause of action against sovereign entities, as opposed to their indirect role in the context of diplomatic protection, thus originating the modern ISDS system.[430]

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[425] *See* JESWALD W. SALACUSE, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24(3) *The International Lawyer*, 1990, p. 675 ("[I]nvestors may have a greater sense of security because of the BIT's dispute settlement provisions and its written rules.").

[426] VCLT, Article 26 (enshrining the fundamental principle of *pacta sunt servanda*).

[427] From time to time, scholars have underlined the numerical growth of BITs. Compare JESWALD W. SALACUSE, *BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries*, 24(3) *The International Lawyer*, 1990, p. 655 ("By 1989 over three hundred BITs had been concluded.") with KENNETH J. VANDEVELDE, *A Brief History of International Investment Agreements*, 12(1) *U.C. Davis Journal of International Law and Policy*, 2005, p. 157 ("More than 2500 such agreements now exist, with the great majority having been concluded since 1990.").

[428] *See e.g.*, The Energy Charter Treaty, 2080 UNTS 100, dated 17 December 1994 ('ECT').

[429] For an insightful account of the hybrid foundations of investment arbitration, with particular regard to the public/private nature of the system *see* ALEX MILLS, *Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration*, 14(2) *Journal of International Economic Law*, 2011, pp. 469 ff.

[430] Notably, the first BIT mentioned before did not include an ISDS provision, even though it would become more common in the next decade. KENNETH J. VANDEVELDE, *A Brief History of*

The alleged benefit of arbitration was to create a specific venue for investment disputes, without requiring investors to pursue diplomatic protection or rely on domestic courts' proceedings. The former regime was considered cumbersome because it required the political willingness of the investor's State of nationality, while traditional litigation was regarded as a risky procedure on account of the length of domestic proceedings and the perceived bias of internal courts within the host State.[431]

Instead, arbitration allowed the parties to a dispute to take part in the appointment of the adjudicating body tasked with the decision. Indeed, the composition of arbitral tribunals deciding investment disputes is based on the widely popular principle that each party chooses an arbitrator while the president of the tribunal is typically selected by agreement of the parties or the other arbitrators.[432]

Notably, in parallel with the development of IIAs, States established institutions and procedural frameworks to manage the proceedings brought by investors, often replicating the rules applied in commercial arbitration.[433]

At first, the number of investment disputes decided within the ISDS system was scarce,[434] but a real boom occurred through the '90s, after the end of the Cold War, with hundreds of cases submitted to *ad hoc* arbitral tribunals. Shortly after, at the beginning of

International Investment Agreements, 12(1) *U.C. Davis Journal of International Law and Policy*, 2005, p. 174. *See e.g.*, Agreement between Netherlands and Indonesia on Economic Cooperation, dated 17 June 1968, Article 11.

[431] For a critical appraisal of these assumptions *see* LEON TRAKMAN, *Choosing Domestic Courts over Investor-State Arbitration: Australia's Repudiation of the Status Quo*, 35 *University of New South Wales Law Journal*, 2012, pp. 979 ff.

[432] *See* extensively CHIARA GIORGETTI, *The Selection and Removal of Arbitrators in Investor-State Dispute Settlement*, Leiden and Boson 2019.

[433] *See e.g.*, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 575 UNTS 159 ('ICSID Convention'), dated 18 March 1965 (establishing an institutional framework for the resolution of investment disputes and providing for necessary structures and procedural rules); United Nations Commission on International Trade Law ('UNCITRAL'), UNCITRAL Arbitration Rules, UN Doc A/31/98, adopted by the UN General Assembly on 28 April 1976 (mostly used set of procedural rules in *ad hoc* investment arbitration, recently amended in 2010 and 2013).

[434] The first known investment treaty case was decided only in 1990. *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, dated 27 June 1990. Previously, the few investment arbitration cases were based on contractual compromissory clauses.

the 21st century, the right of private parties to claim damages deriving from the actions of public authorities had become consolidated.[435]

In the last decade, the recourse to ISDS has constantly grown – its availability being secured by the more than 3000 treaties with investment provisions currently in force[436] – notwithstanding the backlash against investment treaty arbitration, whose major causes are outlined below.

1.2 The Critical Discussion Over Investment Arbitration

The study of the ISDS system is deeply influenced by the strong opposition to the way investment disputes are handled by arbitral tribunals. In order to raise the awareness of the public opinion, non-governmental organizations have put in light many unsatisfactory features of this phenomenon,[437] which has also been harshly criticized by several scholars and practitioners.[438]

The starting point in this discussion concerns the substantial effects that the decisions taken in the context of investment arbitration may have on crucial issues of public interest.

In this regard, arbitral tribunals have been entrusted with a very great power. In fact, they are responsible for giving substance to the general obligations established by

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[435] United Nations Conference on Trade and Development ('UNCTAD'), Latest Developments in Investor-State Dispute Settlement, *available at* unctad.org (showing the rise in investment arbitration cases from 1987 to 2005).

[436] *See* UNCTAD, Investment Policy Hub Database, *available at* investmentpolicyhub.unctad.org.

[437] *See e.g.*, PIA EBERHARDT AND CECILIA OLIVET, *Profiting from injustice. How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, Corporate Europe Observatory and the Transnational Institute, 2012.

[438] An extensive amount of academic writings has focused on the issues of the ISDS system. *See inter alia* SUSAN D. FRANCK, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73(4) *Fordham Law Review*, 2005, pp. 1521 ff.; GUS VAN HARTEN, *Investment Treaty Arbitration and Public Law*, Oxford 2007; GEORGE KAHALE III, *Rethinking ISDS*, 44(1) *Brooklin Journal of International Law*, 2018, pp. 11 ff. As a matter of course, there are also different and more positive perspectives concerning the ISDS system. *See e.g.*, CHARLES N. BROWER AND SADIE BLANCHARD, *What's in a Meme? The Truth about InvestorState Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 *Columbia Journal of Transnational Law*, 2014; ALBERT HENKE, *La crisi del sistema ISDS e il progetto, non convincente, di una nuova corte arbitrale permanente*, 31(1) *Il diritto del commercio internazionale*, 2017, pp. 133 ff. As seen below, however, the need to reform the system has now become part of the agenda of the international community.

IIAs for the protection of foreign investments.[439] According to different interpretations of a standard of treatment, the same or similar State's conducts may constitute a violation of the investment protections or may be considered perfectly in line with its international obligations.

For instance, the notion of fair and equitable treatment ('FET') – which is included in almost every treaty with investment provisions and is "the most relied upon and successful basis for IIA claims by investors"[440] – must be interpreted to assess which specific treatment shall be accorded to foreign investment by the State. Indeed, IIAs' drafters could not and did not provide for a list of the conducts that they had in mind when they included a provision preventing States to treat investors "unfairly" or in an "inequitable" way.[441]

Although the FET standard was still largely unknown at the end of the 20th century, in a few years it became one of the most important clauses in IIAs.[442] Gradually, arbitral tribunals started giving an extensive interpretation of this rule, as occurred with other investment provisions, which often were given a different and larger scope when compared with the minimum standard of treatment provided under customary international law and the rules of diplomatic protection.[443]

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[439] *See* the discussion in § II.2.3 on the creative function of international adjudicating bodies and its effect on the fragmentation of the international legal order.

[440] UNCTAD, *Fair and Equitable Treatment: A Sequel*, in *UNCTAD Series on Issues in International Investment Agreements II*, New York and Geneva 2012, p. 1.

[441] There are different possible formulations of the FET standard, which can be unqualified or linked to other rules of international law. UNCTAD, *Fair and Equitable Treatment*, in *UNCTAD Series on Issues in International Investment Agreements II*, New York and Geneva 2012, pp. 7-8. For instance, a number of States, including the U.S., Canada and Mexico as parties to the North American Free Trade Agreement ('NAFTA'), have clarified that the FET standard included in IIAs has the same scope of the minimum standard of treatment of aliens under customary international law. NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, dated 31 July 2001, para. B.2. This development was a consequence of the liberal interpretations adopted by certain arbitral tribunals.

[442] *See* the seminal article by STEPHEN VASCIANNIE, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 *British Yearbook of International Law*, 2000, p. 130 ("Attempts to identify the precise contents of the standard are also limited by the fact that the arbitral jurisprudence on this point is almost non-existent.")

[443] For a thorough analysis and a reasoned critique of this evolution *see* M. SORNARAJAH, *Resistance and change in the international law on foreign investment*, Cambridge 2015, p. 247 ("The creation of a law based on the fair and equitable standard is a vindication of the view presented in this work that the primary thrust in investment arbitration has been to promote

As effectively summarized in a volume published by the United Nations Conference on Trade and Development ('UNCTAD'):

> many tribunals have interpreted [FET] broadly to include a variety of specific requirements including a State's obligation to act consistently, transparently, reasonably, without ambiguity, arbitrariness or discrimination, in an evenhanded manner, to ensure due process in decision-making and respect investors' legitimate expectations.[444]

Clearly, expanding the scope of investment protection to this extent has the effect of limiting States' freedom of action.[445]

From this point of view, it is often suggested that the ISDS system may constitute an obstacle to the exercise of regulatory powers by sovereign entities.[446] In practice, given the broad interpretations of the protections established by IIAs, a measure taken for a public purpose may often entail the international responsibility of the State. On their part,

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investment protection according to a desired model, and not to bring about a law that balances the interests of the foreign investor with other interests of the host state, its people and the international community as a whole.").

[444] UNCTAD, *Fair and Equitable Treatment: A Sequel*, in *UNCTAD Series on Issues in International Investment Agreements II*, New York and Geneva 2012, p. xiii. Among the various decisions that have contributed to such extensive interpretation *see e.g. Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, dated 29 May 2003, para. 154 ("The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.")

[445] M. SORNARAJAH, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in KARL P. SAUVANT (Ed*.), Appeals Mechanism in International Investment Disputes*, Oxford 2008, pp. 39 ff.

[446] VERA KORZUN, *The Right to Regulate in InvestorState Arbitration: Slicing and Dicing Regulatory Carve-Outs*, 50 *Vanderbilt Journal of Transnational Law*, 2017, pp. 355 ff.; Scholars have proposed a number of solutions to overcome this problem. *See e.g.*, RAHIM MOLOO AND JUSTIN M. JACINTO, *Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law*, 2011-2012 *Yearbook on International Investment Law and Policy*, 2013 (proposing a "deferential standard of review for adjudication of investment treaty claims relating to public interest regulatory measure.").

investors are certainly aware of this possibility, since a large number of their claims are based on actions taken to address public concerns.[447]

A widely known example is the *Philip Morris* case, in which a tobacco company claimed that certain legislative measures adopted by Uruguay had caused a violation of the standards of treatment provided by the applicable BIT, including the FET.[448] Such legislative measures had restrictively regulated the business of selling tobacco products, primarily by imposing that the 80% of cigarette packages was to be covered with health warnings. This anti-smoking policy was required to reduce the high smoking rate of the country and actually implemented the WHO Framework Convention on Tobacco Control. Eventually, the arbitral tribunal rejected the investor's claims, taking into account the consensus of the scientific community over the lethal effects of tobacco and the reasonableness of Uruguay's conduct.[449]

However, there have been other instances in which arbitral tribunals have disregarded the fact that a State was acting to address an economic crisis or to defend its national security interests and held that the State had failed to accord the prescribed standard of treatment under the relevant IIAs.[450]

Another factor that needs to be taken into account concerns the extraordinary amounts recognized as compensation by arbitral tribunals when reaching decisions in favor of the investors, in the face of the steep growth in the amounts claimed. In the last

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[447] Recently, news websites have reported that notices of claims were filed with respect to measures taken in the context of the current COVID-19 pandemic. COSMO SANDERSON, *Peru Threatened over Coronavirus Emergency Measure*, *Global Arbitration Review*, dated 5 June 2020.

[448] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, dated 8 July 2016.

[449] *Id.*, paras. 414-420. *See also* YANNICK RADI, *Philip Morris v Uruguay Regulatory Measures in International Investment Law: To Be or Not To Be Compensated?*, 33(1) *ICSID Review - Foreign Investment Law Journal*, 2018, pp. 74 ff.

[450] *See e.g.*, *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, dated 12 May 2005, paras. 304-394. Notably, the *ad hoc* Annulment Committee in the *CMS v. Argentina* case found clear legal errors in the award – especially with respect to the necessity defense raised by Argentina – but failed to overturn the award because of its limited jurisdiction. *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, dated 25 September 2007, para. 136. *See* WILLIAM W. BURKE-WHITE, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, in Michael Waibel et al. (Eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality*, Alphen aan den Rijn 2010, pp. 407 ff.

few years, it has become commonplace for an award to assess damages in excess of one billion USD.[451] In turn, this may have enormous consequences on the budget of any State, but it is particularly dangerous for developing States, which have also to deploy massive resources to defend themselves in the arbitration proceedings.[452]

In addition, IIAs do not ordinarily provide for obligations upon investors; therefore, the parties to a dispute are generally in an asymmetric position.[453] Except for very rare examples,[454] the idea of subjecting transnational enterprises to the same set of human rights standards that are binding upon States is far from being even taken into consideration in the field of investment law.[455]

In parallel with these critics of a substantial nature, the debate over the ISDS system has also focused on the lack of transparency and procedural fairness of arbitral tribunals.

To begin with, not all the investment tribunals' decisions are available to the public, because there is no general rule of disclosing the rulings of investment

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[451] JULIAN CARDENAS GARCIA, *The Era of Petroleum Arbitration Mega Cases*, 35(3) *Houston Journal of International Law*, 2013 (commenting the Occidental v. Ecuador case, awarding almost 2 billion USD to the investor). *See also* MATTHEW HODGSON AND ALASTAIR CAMPBELL, *Damages and Costs in Investment Treaty Arbitration Revisited*, dated 14 December 2017 (showing the steep increase in damages claimed and awarded by arbitral tribunals in the last decade).

[452] According to an empirical study on almost 400 decisions issued by arbitral tribunals mean costs for a Respondent in an investment treaty case amount to almost 5 million USD. MATTHEW HODGSON AND ALASTAIR CAMPBELL, *Damages and Costs in Investment Treaty Arbitration Revisited*, dated 14 December 2017, p. 2.

[453] For the view that human rights obligations should be incorporated in IIAs *see* PATRICK DUMBERRY AND GABRIELLE DUMAS AUBIN, *How to Impose Human Rights Obligations on Corporations Under Investment Treaties? Pragmatic Guidelines for the Amendment of BITs*, *2011–2012 Yearbook on International Investment Law and Policy*, 2013, p. 569 ("[F]oreign investors (overwhelmingly corporations, but sometimes individuals) are being accorded substantive *rights* under these treaties without being subject to any specific *obligations*.") (emphasis in original).

[454] *See e.g.*, *Urbaser s.a. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina*, ICSID Case No. ARB/07/26, Award, dated 8 December 2016. In this controversial decision, the arbitral tribunal affirmed its jurisdiction to consider a counterclaim of the respondent State based on the alleged violation of the human right to water on the part of Claimants. However, the tribunal rejected the counterclaim on the merits, since "the enforcement of the human right to water represents an obligation to perform. Such obligation is imposed upon States. It cannot be imposed on any company knowledgeable in the field of provision of water and sanitation services."). *Id.*, para. 1210.

[455] *See* the discussion from the perspective of Societal Constitutionalism in § I.3.2.

tribunals, albeit the ICSID Convention allows the publication of excerpts to understand the legal reasoning of the adjudicating bodies.[456] At the same time, most of the hearings are not public, being only opened to the parties, just as the relevant submissions in the case, which are secreted. Such obstruction does not help with the problem of the perceived lack of legitimacy of these organs.[457]

In this context, while the role of *amici curiae* is expanding in recent investment arbitration cases, it has not reached the level of importance that it has in other international *fora*, yet.[458] Therefore, the degree of control of civil society over the appropriateness of these proceedings is certainly not as high as the sensitivity of the issues decided would require.

More in general, the ISDS system has increasingly adopted features resembling the ones of an exclusive club. In fact, the same arbitrators are appointed multiple times and often act as counsels or experts in other investment treaty arbitrations.[459] In addition, since their compensation depends on the number of tribunals in which they sit, arbitrators are benefiting from the increase in investment claims – which can only be submitted by investors – and are therefore in a position of conflict of interests.[460]

[456] ICSID Convention, Article 48(4).
[457] *See* the references to the crucial role of transparency for international adjudicating bodies in § II.1.3.
[458] *See* recently CRINA BALTAG, *The Role of Amici Curiae in Light of Recent Developments in Investment Treaty Arbitration: Legitimizing the System?*, *ICSID Review - Foreign Investment Law Journal*, 2020, pp. 1 ff. *See* § II.1.3.
[459] DAVID GAUKRODGER AND KATHRYN GORDON, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment, No. 2012/3, Paris 2012, p. 45 ("For a mechanism that allows parties to choose their arbitrators with only few limitations, it is striking to find that a group of only 12 arbitrators have been involved (typically as one or more of three arbitrators) in 60% of a large sample of ICSID cases (a total of 158 cases out of 263 tribunals). Frequent arbitrators may also serve in other cases as counsel or experts on legal issues.")
[460] *See* § II.1.3.

Most importantly, empirical studies have suggested that investment tribunals may have a pro-investor bias.[461] While there is no conclusive evidence in this regard,[462] the issue has originated a heated debate on the role of arbitrators, with particular regard to the possibility of challenging them on account of their lack of impartiality or independence.[463]

In addition, IIAs have proliferated on the basis of the assumption that the protections they safeguard have the effect of encouraging foreign direct investment. However, such controversial statement has been questioned by a number of empirical studies,[464] as well as by the mere fact that certain countries have managed to attract foreign investment even by adopting restrictive policies in relation to IIAs.[465] In any event, it is doubtful that such long-term consequences could have been imagined by IIAs' drafters in the 20th century, which were probably unaware of the macroscopic risks illustrated in this paragraph.[466] To put it in the words of Joost Pauwelyn:

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[461] GUS VAN HARTEN, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50(1) *Osgoode Hall Law Journal*, 2012, p. 252 ("[T]here is tentative support for expectations of systemic bias arising from the interests of arbitrators in light of the system's asymmetrical claims structure and the absence of conventional markers of judicial independence."); JULIAN DONAUBAUER ET AL., *Winning or losing in investor-to-state dispute resolution: The role of arbitrator bias and experience*, 26(4) *Review of International Economics*, 2018, pp. 892 ff. (arguing that the previous experience of arbitral tribunals' presidents as party-appointed arbitrators may adversely affect their impartiality).

[462] CHARLES N. BROWER AND SADIE BLANCHARD, *What's in a Meme? The Truth about InvestorState Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 *Columbia Journal of Transnational Law*, 2014, p. 709.

[463] The rules for challenging arbitrators have generally been interpreted restrictively. *See* CHIARA GIORGETTI, *Who Decides Who Decides in International Investment Arbitration?*, 35(2) *University of Pennsylvania Journal of International Law*, 2014, pp. 431 ff.

[464] The literature is not conclusive as to the positive effects of IIAs. *See* JOACHIM POHL, *Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence*, OECD Working Papers on International Investment, 2018/01, OECD Publishing, Paris 2018; MARY HALLWARD-DRIEMEIER, *Do Bilateral Investment Treaties Attract FDI? Only a Bit...And They Could Bite*, World Bank, Policy Research Paper WPS 3121, 2003.

[465] Brazil is the most notable example of a country that has not taken part to the investment treaty system, although it always succeeded in attracting foreign investment. Only recently it has signed a few IIAs, which are remarkably different from the typical investment agreement. *See* extensively MARTINO MAGGETTI AND HENRIQUE CHOER MORAES, *The Policy-Making of Investment Treaties in Brazil: Policy Learning in the Context of Late Adoption*, in CLAIRE A. DUNLOP ET AL. (Eds.), *Learning in Public Policy*, Cham 2018, pp. 295 ff.

[466] JONATHAN BONNITCHA, LAUGE N. SKOVGAARD POULSEN, MICHAEL WAIBEL, *The Political Economy Of The Investment Treaty Regime*, Oxford 2017, p. 222 ("Political symbolism and

> a series of discrete, small steps by both contract and treaty negotiators, international institutions, and arbitrators which, taken together, vegetated into the complex regime with which we are all familiar. From this perspective, rather than a drift toward efficiency, some of the regime's core features (e.g. commercial-style arbitration for regulatory-type treaty disputes) are pathological or at least sub-optimal.[467]

Given the above critical issues, States have become gradually more conscious about the drawbacks of the ISDS system, especially among developing countries. Hence, the last decade has shown a backlash against investment treaty arbitration, having regard to States' withdrawals from multilateral and bilateral investment treaties.[468] In the meantime, various paths of reforms have been proposed,[469] including the establishment of a Multilateral Investment Court advanced by the European Union,[470] but the consensus needed to amend the very structure of the system is a strong obstacle to their implementation, which could require a really long time.[471]

Against this background, the legitimacy problem of international investment law has been the main focus of the scholars attempting an analysis of the phenomenon within

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transnational mimicry were the main drivers of many investment treaties rather than instrumental considerations relating to the legal content and the practical implications of the treaties.").

[467] JOOST PAUWELYN, *Rational Design or Accidental Evolution? The Emergence of International Investment Law*, in ZACHARY DOUGLAS ET AL. (Eds.) *The Foundations of International Investment Law: Bringing Theory Into Practice*, New York 2014, p. 19.

[468] Bolivia, Ecuador and Venezuela have withdrawn from the ICSID Convention. India, Indonesia and South Africa are among a larger group of countries that have terminated or amended their BITs. *See* ALEXANDER THOMPSON ET AL., *Once Bitten, Twice Shy? Investment Disputes, State Sovereignty, and Change in Treaty Design*, 73(4) *International Organization*, 2019, pp. 859 ff. *See also* the reaction of the European Union, as outlined in the following section.

[469] *See*, in particular, the comprehensive effort of the UNCITRAL Working Group. UNCITRAL, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of Its Thirty-Fourth Session*, UN Doc. A/CN.9/930, dated 19 December 2017. More specific hypotheses of reform are regularly advanced by scholars to enhance the legitimacy of the ISDS system. *See e.g.*, recently, CRINA BALTAG AND YLLI DAUTAJ, *Investors, States, and Arbitrators in the Crosshairs of International Investment Law and Environmental Protection*, Leiden 2020.

[470] MARC BUNGENBERG AND AUGUST REINISCH, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement*, Cham 2018.

[471] For a recent summary of the different approaches to the ISDS system's reform *see* ANTHEA ROBERTS, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112(3) *American Journal of International Law*, 2018, pp. 410 ff.

the approach of Global Constitutionalism.[472] Investment arbitration has struggled to ensure a balance between the protection of investments – which has come to be regarded as an unjustified privilege[473] – and the safeguard of the separation of powers – taking into account the problems caused to the exercise of States' powers for public purposes in light of the extensive interpretation of investment protection standards.[474] The key issue is that the ISDS system has arguably enabled arbitrators to express their views on issues of public interest, without the necessary safeguards that are ordinarily found in permanent adjudication.[475]

1.3. Fragments Within Fragments: The Nature of the Investment Law Regime

In light of the above overview, it is submitted that the investment law regime – rather than constituting a system having constitutional qualities – may be characterized as a perfect example of fragmentation within the international legal order, a phenomenon already addressed in the second chapter of this work.[476] In fact, it has developed as an autonomous "branch" of general international law, with its own rules and vision, its

[472] For a general assessment of the interplay between global constitutionalism and international economic law *see* CHRISTINE SCHWÖBLE-PATEL, *The Political Economy of Global Constitutionalism*, in ANTHONY F. LANG AND ANTJE WIENER (EDS.), *Handbook on Global Constitutionalism*, Cheltenham 2017, pp. 407 ff. *See also* ALESSANDRA ALGOSTINO, *ISDS (Investor-State Dispute Settlement), il cuore di tenebra della global economic governance e il costituzionalismo*, 1 *Costituzionalismo.it*, 2016, pp. 126 ff.

[473] MATTIAS KUMM, *An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege*, 4(3) *European Society of International Law Reflections*, 2015 (underlining the lack of constitutional features of arbitral tribunals formed under IIAs and the absence of a justification to such special protection regime).

[474] DAVID SCHNEIDERMAN, *Global Constitutionalism and Its Legitimacy Problems: Human Rights, Proportionality, and International Investment Law*, 12(2) *Law and Ethics of Human Rights*, 2018, pp. 251 (stressing arbitrators' reluctance to embrace a proportionality analysis in the context of "constitutional-like" rights of foreign investors).

[475] *See* VICTOR FERRERES COMELLA, *Arbitration, Democracy and The Rule Of Law: Some Reflections on Owen Fiss'S Theory*, Seminario en Latinoamérica de Teoría Constitucional y Política, 2014.

[476] *See* § II.2. With regards to the relationship between fragmentation and investment law *see inter alia* ANNE VAN AAKEN, *Fragmentation of International Law: The Case of International Investment Protection*, XVII *Finnish Yearbook of International Law*, 2008, pp. 91 ff. (affirming that, to overcome the issues of fragmentation, investment law "must evolve and be interpreted consistently with international law."); CATHARINE TITI, *Who's Afraid of Reform? Beware the Risk of Fragmentation*, 112 *American Journal of International Law Unbound*, 2018, pp. 232 (underlining that reforms of the ISDS system may increase its inherent fragmentation).

growth being deeply connected with globalization, which facilitated the movement of capital across the world.

Notwithstanding the crucial role of States in crafting the general structure of this system, the main architects of this unexpected and rapid success were the arbitral tribunals established under the ISDS clauses of IIAs. These bodies – which have been exercising a crucial judicial function, within the meaning clarified in the second chapter[477] – were able to transform what could only be regarded as a mysterious area only thirty years ago into one of the most dynamic and ever-expanding specialized sectors of international law.[478]

More specifically, even though they should not have interpreted IIAs in isolation,[479] arbitral tribunals have regularly advocated the *lex specialis* nature of the investment law regime resulting from the treaties in order to distance themselves from the prevailing interpretations in international law.[480] More often than not, however, the principle of *lex specialis derogat lege generali* was applied in the absence of a clear conflict between two applicable rules.[481]

It has already been noted that the standards of treatment in IIAs were often considered as a different kind of creature from the minimum standard of treatment

[477] *See* § II.1.2.
[478] International Law Commission, Report of the Study Group on Fragmentation (finalized by Martti Koskenniemi), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, dated 13 April 2006 ('ILC Report'), para. 8 (describing investment law in 2006 as an "exotic and highly specialized" knowledge).
[479] *See* VCLT, Article 31(3)(c). *See also Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, dated 27 June 1990 ("[T]he Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.").
[480] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, dated 21 November 2007, para. 117 ("The Tribunal finds that Section A of Chapter Eleven offers a form of *lex specialis* to supplement the under-developed standards of customary international law relating to the treatment of aliens and property.").
[481] ILC Report, paras. 56 ff.

protected at custom, even when there were no elements to distinguish the two concepts, forcing States to adopt authentic interpretations of the relevant rules.[482]

A further illustrative example concerns the possibility of submitting reflective loss claims.

It is a well-established principle of international law that a shareholder cannot claim damages on behalf of the company in which it holds shares.[483] This rule was made clear by the ICJ in the *Barcelona Traction* case, which concerned the claims of Belgian shareholders in a Canadian company.[484] The Court rejected the idea that Belgium could submit the case on behalf of its nationals, because the rules of diplomatic protection require that only the State of nationality of the affected party may act in its defense. Since in that case the rights infringed belonged to the Canadian company, only Canada could have potentially brought a claim on its behalf.[485] The Court appeared to be particularly aware of the risks arising from allowing reflective loss claims, affirming that:

> by opening the door to competing diplomatic claims, could create an atmosphere of confusion and insecurity in international economic relations. The danger would be all the greater inasmuch as the shares of companies whose activity is international are widely scattered and frequently change hands.[486]

This position, which incidentally resembles the rules provided by several national legal systems, was later confirmed by the ICJ in the *Diallo* case and was also adopted by the ECtHR.[487]

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[482] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/04/5, Award, dated 21 November 2007; NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, dated 31 July 2001, para. B.2.

[483] *See* among the others GABRIEL BOTTINI, *Indirect Claims Under the ICSID Convention*, 29(3) *University of Pennsylvania Journal of International Law*, 2008, p. 573 ("[T]he position under customary international law is clear as to the inadmissibility of claims by or on behalf of a shareholder in relation to damages suffered by the corporation.").

[484] ICJ, *Case concerning the Barcelona Traction, Light and Power Company Limited* (Belgium v. Spain), Judgment, in *ICJ Reports 1970*, dated 5 February 1970.

[485] *Id.*, paras. 41-47.

[486] *Id.*, para. 96.

[487] ICJ, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, in *ICJ Reports* 2010, dated 30 November 2010, para. 155 ("The Court observes that international law has repeatedly acknowledged the principle of domestic law that a

However, the arbitral tribunals established under IIAs have relied on the alleged *lex specialis* nature of investment law to affirm that shareholders may submit claims on behalf of the companies in which they own shares, in accordance with "stretched" interpretations of the relevant treaties.[488] In turn, as predicted by the ICJ, such green light has resulted in constant confusion as to the determination of the relevant requisites of IIAs, with the associated risk of allowing double recovery and contributing to the phenomenon of inconsistent decisions, as seen below.

At the same time, the decisions in the context of investment arbitration have not only contradicted the reasoning and the consolidated case law of other international adjudicating bodies but have continuously contradicted themselves.

The primary and very noticeable problem of coordination in the context of the ISDS system concerns the so-called "parallel proceedings" in which the same or similar set of circumstances are adjudicated by different arbitral tribunals because – for instance – different companies in the chain of ownership advance claims in accordance with different IIAs.[489]

In this regard, the most known examples are the *Lauder* and *CME* decisions, which have been defined as the "ultimate fiasco" in investment arbitration.[490] In that circumstance, a U.S. investor and its Dutch company initiated separate proceedings

company has a legal personality distinct from that of its shareholders."); ECtHR, *Tommi Tapani Anttila v. Finland*, Application No. 16248/10, Decision, dated 19 November 2013, para. 24. "[A] person cannot complain of a violation of his or her rights in proceedings to which he or she was not a party, even if he or she was a shareholder . . . of a company which was party to the proceedings.").

[488] Arbitral tribunals have based their decisions on the fact that the IIAs often include "shares" among the protected investments. *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction, dated 30 April 2004, para. 50. *See*, however, GABRIEL BOTTINI, *Indirect Claims Under the ICSID Convention*, 29(3) *University of Pennsylvania Journal of International Law*, 2008, p. 591 ("[T]he fact that shares are a protected investment under the applicable BIT does not dispose of the question whether the investor has *jus standi*, since it will still be necessary to determine whether the claim genuinely refers to the rights that such investment confers.").

[489] *See* § II.3.1.

[490] AUGUST REINISCH, *The Proliferation of International Dispute Settlement Mechanisms: The Threat of Fragmentation vs. the Promise of a More Effective System? Some Reflections From the Perspective of Investment Arbitration*, in ISABELLE BUFFARD ET AL. (Eds.), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*, Leiden and Boston 2008.

against the Czech Republic for the same reasons and based on the same facts. Eventually, the two arbitral tribunals formed under the relevant BITs reached opposed decisions ten days apart from each other.[491]

A similar incoherent outcome was reached in the context of the arbitral proceedings against Argentina arising out of the measures taken by the State as a direct consequence of its economic crisis between 2001 and 2002. Dozens of claims have been brought by investors on that basis, but the relevant decisions have often been inconsistent, even though they relate to similar facts and provisions.[492]

Furthermore, the inconsistency of investment law does not arise solely from conflicting decisions over the same or similar circumstances, but it is rooted in the "jurisprudential mess" characterizing many areas of great importance.[493] Indeed, comparable clauses have been interpreted in essentially opposed ways.[494] As affirmed in the *AES v. Argentina* case:

> Each tribunal is sovereign, and may retain . . . a different solution for resolving the same problem.[495]

In fact, there is no rule of precedent in international investment law,[496] while decisions and awards of adjudicating bodies, including those of other arbitral tribunals,

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[491] *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, dated 3 September 2001 (denying the investor's claims); *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, dated 13 September 2001 (recognizing that the State had violated several standards of conduct).

[492] WILLIAM W. BURKE-WHITE, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, in Michael Waibel et al. (Eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality*, Alphen aan den Rijn 2010, pp. 407 ff.

[493] ALAIN PELLET, *The Case Law of the ICJ in Investment Arbitration*, 28(2) *ICSID Review - Foreign Investment Law Journal*, 2013, p. 224 (discussing and rejecting the idea of a *jurisprudence constante* within the ICSID system as to the definition of the term "investment," the operation of most favored nation clauses and so-called umbrella clauses within IIAs).

[494] *See e.g.*, with respect to the admissibility of contract claims, the two conflicting decisions over a similar provision in the relevant BITs. *SGS Société Générale de Surveillance SA v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, dated 6 August 2003, paras 163-174; *SGS Société Générale de Surveillance SA v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, dated 29 January 2004, paras. 113-129.

[495] *AES Corporation v. The Argentine Republic*, ICSID Case No. ARB/02/17, Award, dated 26 April 2005, para. 30.

[496] ZACHARY DOUGLAS, *Can a Doctrine of Precedent Be Justified in Investment Treaty Arbitration?*, 25(1) *ICSID Review - Foreign Investment Law Journal*, 2010, pp. 104 ff. (adding

can be regarded only as "subsidiary means for the determination of rules of law" in accordance with the formulation of the ICJ Statute.[497]

In any event, the critical issue of predictability and stability of the rules on foreign investment has further emerged as an additional concern for a system that was originally perceived as a way of fostering the rule of law worldwide.

Several proposals have been made to resolve these problems. In particular, various stakeholders have suggested to set up a permanent global institution tasked with the decision of investment disputes or – more often – an appeal mechanism to bring unity in this heterogeneous scenario.[498]

While there might be something of interest in these ideas, they cannot be implemented in the absence of a strong consensus in the international community, which seems to be lacking at the moment.[499]

Ultimately, a certain level of inconsistency is inherent in the ISDS system's very nature. Besides, it would have been improbable that a plethora of arbitral tribunals tasked with the application of a mosaic of treaties could give rise to a coherent framework.[500]

2. The Compatibility of intra-EU Investment Arbitration with EU Law

that the lack of a *stare decisis* principle would also allow arbitral tribunals to reverse previous findings on reflective loss claims).

[497] ICJ Statute, Article 38(1)(d).

[498] *See* the discussion of the crisis of the annulment function within the ICSID system and a review of recent proposals of reforms as summarized by LORIS MAROTTI, *Il doppio Grado di Giudizio nel Processo Internazionale*, Milano 2019, pp. 192 ff.

[499] *See* ANTHEA ROBERTS, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112(3) *American Journal of International Law*, 2018, pp. 410 ff.

[500] *See* the opposite view of STEPHAN SCHILL, *The Multilateralization of International Investment Law*, Cambridge 2009 (advocating the idea that most favored nation clauses are the legal basis for the multilateralization of international investment law, allowing to import substantive and procedural standards of treatment from other treaties). *Contra* SIMON BATIFORT AND J. BENTON HEATH, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111 *American Journal of International Law*, 2018, pp. 873 ff (suggesting a more nuanced approach to the interpretation of most favored nation clauses).

2.1 Investor-State Dispute Settlement Within the EU Context

European Union Member States have been among the leading actors in the field of investment law for a long time. They were mainly responsible for the boom of BITs during the second half of the 20th century, considering that the very first BIT was concluded by Germany, which, together with Italy, France and other Western European countries, accounted for the initial rise in the use of this instrument.[501]

In general, EU Member States concluded their BITs with developing countries aiming to protect European investors abroad more than to guarantee the flows of investments in Europe. As a matter of fact, the great part of investment disputes has been initiated by nationals of European countries against non-European States.[502]

Over time, however, the use of the ISDS system has become increasingly common against EU Member States, totaling a larger share of investment cases each year.[503] Such development is certainly due to the enlargement of the EU to the countries in Eastern Europe, but also to the fact that foreign investors are now bringing claims even against traditionally developed economies, such as Italy, Spain or Germany.

What is more is that the great part of such claims – accounting approximately for the 20% of worldwide investment disputes in recent times – are submitted by European investors against European States.[504]

Indeed, there are hundreds of so-called intra-EU BITs, which are regularly relied upon by foreign investors.[505] Most of these treaties were signed during the '90s after the dissolution of the Soviet Union and the subsequent end of the Eastern bloc. At that time, therefore, the treaties were concluded by an EU Member State and a non-EU State, or by two non-EU States, but they later became intra-EU agreements with the enlargement of

[501] KENNETH J. VANDEVELDE, *A Brief History of International Investment Agreements*, 12(1) *U.C. Davis Journal of International Law and Policy*, 2005, p. 169.
[502] UNCTAD, Fact Sheet on Investor-State Dispute Settlement Cases in 2018, dated May 2019, *available at* unctad.org, p. 3.
[503] UNCTAD, Fact Sheet on Intra-European Union Investor-State Arbitration Cases, dated December 2018, *available at* unctad.org, p. 1.
[504] UNCTAD, Fact Sheet on Investor-State Dispute Settlement Cases in 2018, dated May 2019, *available at* unctad.org, p. 3.
[505] *See* UNCTAD, Fact Sheet on Intra-European Union Investor-State Arbitration Cases, dated December 2018, *available at* unctad.org (providing an annex with the available information on the 174 known intra-EU investment arbitration cases).

the EU in 2004. As recalled in a recent dissenting opinion of arbitrator Marcelo Kohen "there are no BITs that were concluded between two States after their EU membership."[506]

In addition, a large number of claims is based upon the Energy Charter Treaty ('ECT') a multilateral agreement entered into force in 1998 with the aim of establishing a framework for energy cooperation, which includes substantial protection for foreign investors as well as an ISDS clause.[507] Notably, the EU itself promoted the conclusion of the agreement and is one of the 53 Contracting Parties of the ECT, even if, until recently, its membership was merely connected to its role as a regulator in energy-related matters.[508]

As early as in 2006, the European Commission expressed its concern over the situation of the intra-EU BITs in the following terms:

> There appears to be no need for agreements of this kind in the single market and their legal character after accession is not entirely clear. It would appear that most of their content is superseded by Community law upon accession of the respective Member State. However the risk remains that arbitration instances, possibly located outside the EU, proceed with investor-to-state dispute settlement procedures without taking into account that most of the provisions of such BITs have been replaced by provisions of Community law. Investors could try to practice "forum shopping" by submitting claims to BIT arbitration instead of - or additionally to - national courts. This could lead to arbitration taking place without relevant questions of EC law

[506] *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Statement of Dissent of Professor Marcelo Kohen, dated 3 February 2020, para. 77. *See also* HANNO WEHLAND, *Intra-Eu Investment Agreements and Arbitration: Is European Community Law an Obstacle?*, 58(2) *International and Comparative Law Quarterly*, 2009, p. 297 (stating that "Member State governments appeared tacitly to agree that investment protection between them was a matter of course and additional protection for investors through BITs not necessary" and that before "accession of ten new Member States to the European Union in 2004 only two intraEuropean BITs existed (Germany-Greece and Germany-Portugal) – significantly, these had been concluded before Greece and Portugal became Members of the European Communities in 1981 and 1986 respectively.")

[507] UNCTAD, Fact Sheet on Investor-State Dispute Settlement Cases in 2018, dated May 2019, *available at* unctad.org, p. 3; ECT, Article 26.

[508] *See* JACK BALLANTYNE, *EU Threatened with First ECT Claim*, in *Global Arbitration Review*, dated 24 April 2019.

> being submitted to the CJEU, with unequal treatment of investors among Member States as a possible outcome.[509]

From that point in time the European Commission had been the main advocate of the incompatibility with EU law of intra-EU BITs, regarded as an "outdated" product from the past.[510] Over the years, the European Commission even suggested EU Member States to *formally* terminate their intra-EU BITs for the sake of legal certainty.[511] However, the main two reasons that make these treaties incompatible with EU law were already persuasively enucleated in the 2006 communication and did not require any termination to invalidate the relevant arbitration clauses, as explained below.

First, EU law already provides for the protection of nationals of an EU Member State in another Member State – including those who qualify as foreign investors under an intra-EU BIT.[512] In fact, it could be said that the rights recognized to EU citizens are broader than any standard of treatment recognized under an IIAs.[513]

Notably, those rights include the four freedoms guaranteed inside the European Single Market, *i.e.* the freedom of movement of persons, goods and capital and the right to establish and provide services.[514] Along the same lines, the EU Charter of Fundamental Rights explicitly recognizes the right to property as well as the freedom to conduct business, which are additionally safeguarded by the provisions concerning due

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[509] European Commission, Internal Market and Services DG, Note to the Economic and Financial Committee, dated November 2006 as cited in *Eastern Sugar B.V. (Netherlands) v. The Czech Republic, SCC Case No. 088/2004*, Partial Award, dated 27 March 2007, para. 126.

[510] European Commission, Press Release, Commission asks Member States to terminate their intra-EU bilateral investment treaties, dated 18 June 2015 *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5198.

[511] *See id*. Ireland and Italy have been among the first Member States adopting such measure, having terminated their intra-EU BITs already in 2012 and 2013.

[512] *See* ANGELOS DIMOPOULOS, *The Validity and Applicability of International Investment Agreements Between EU Member States Under EU And International Law*, 48(1) *Common Market Law Review*, 2011, p. 64 (underlining the "extensive scope of overlap" between intra-EU BITs and EU law); JAN KLEINHEISTERKAMP, *Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty*, 15(1) *Journal of International Economic Law*, 2012, pp. 98-100 (stating that intra-EU BITs "were designed to afford the protection of EU investors in the former communist European countries in the absence of the protection afforded by the European treaties" and extensively discuss the overlapping provisions between them).

[513] *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Statement of Dissent of Professor Marcelo Kohen, dated 3 February 2020, para. 27.

[514] TFEU, Articles 45-48, 49-55, 56-62, 63-66. *See* extensively CATHERINE BARNARD, *The Substantive Law of the EU: The Four Freedoms*, New York 2016.

process.[515] As an illustrative example of the practical application of these rules, it is of note that the CJEU recently held that

> by adopting the contested provision and thereby cancelling, by operation of law, the rights of usufruct over agricultural land located in Hungary that are held, directly or indirectly, by nationals of other Member States, Hungary has failed to fulfil its obligations under Article 63 TFEU in conjunction with Article 17 of the Charter.[516]

Besides, in *Francovich v. Italy*, the Court also found that individuals who suffered damages on account of States' failures to implement EU law have the right to seek damages from those States.[517] The CJEU also explicitly affirmed that an infringement of EU law may be caused by a wrongful interpretation of EU law by the judicial bodies of a Member State, as long as such interpretation is widely-held in its legal order.[518]

Finally, Member States must ensure that the rights established by EU Treaties are enjoyed without any discrimination, with particular regard to individuals coming from another EU Member States.[519] From this point of view, intra-EU BITs may even constitute a discriminatory instrument because they are established to protect the

[515] Charter of Fundamental Rights of the European Union (2007/C 303/01), dated 7 December 2000, Articles 16 ("The freedom to conduct a business in accordance with Community law and national laws and practices is recognised."), 17 ("Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss."), 47(1) ("Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."). The Charter of Fundamental Rights has the same binding value of the EU Treaties, according to Article 6(1) of the Treaty on the European Union.

[516] CJEU, Grand Chamber, Case C-235/17, *European Commission v. Hungary*, dated 21 May 2019, para. 131.

[517] CJEU, Joined cases C-6/90 and C-9/90, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*, Judgment, dated 19 November 1991, para. 35.

[518] CJEU, Case C-129/00, *Commission of the European Communities v. Italian Republic*, Judgment, dated 9 December 2003, para. 32.

[519] Article 18(1), TFEU ("Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.").

investments owned by citizens of a specific country and exclude from their application other European citizens.[520]

Therefore, it may be said that the overlapping between the substantial provisions of intra-EU BITs and EU rules is a serious and inevitable consequence, given the broad scope of action of EU law and the preferential nature of the protections offered by intra-EU BITs.

The second major issue in relation to the incompatibility of intra-EU investment treaty concerns the fact that arbitral tribunals may often end up interpreting and applying EU law. In fact, EU rules may be part of the applicable law in the arbitral proceedings considering the peculiar nature that puts the EU legal order at the crossroad between national law and international law.[521]

To give an example, in *Electrabel v. Hungary*, the tribunal affirmed that "EU law (not limited to EU Treaties) forms part of the rules and principles of international law applicable to the Parties' dispute" and subsequently reviewed if Hungary had implemented a decision of the European Commission in relation to State aid law in an arbitrary way.[522]

Hence, as further discussed in the following paragraphs, the conduct of intra-EU arbitral tribunals would run against the principle that the interpretation of EU law is part of the exclusive competence of the CJEU.[523]

In the last ten years, EU Member States have been forced to defend themselves in the myriad of investment disputes initiated by European foreign investors, precisely relying on the said incompatibility between intra-EU BITs and EU law to challenge the jurisdiction of arbitral tribunals. The European Commission has also taken part directly

[520] In this regard, it has been suggested that a possible solution would be to extend intra-EU protections to all European citizens. *See*, however, JAN KLEINHEISTERKAMP, *Investment Protection and EU Law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty*, 15(1) *Journal of International Economic Law*, 2012, pp. 100-101 (noting that there are economical and political reasons to maintain certain standards of protection that cannot be so easily disregarded).
[521] *See* § I.2.3.
[522] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, dated 25 November 2015, paras. 4.195, 8.18 ff.
[523] *See* § I.2.3.

to several intra-EU ISDS proceedings when it was allowed by the arbitrators to file submissions as a non-disputing party.[524]

The main line of argument raised by European respondent States was that EU law would have priority over intra-EU BITs according to the applicable conflict rules under international law.[525]

The EU Treaties include a specific conflict rule, enshrined in Article 351 of the TFEU (formerly Article 307 of the Treaty establishing the European Community ('TEC')), which reads as follows:

> The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.
> To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.
> In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States.[526]

[524] Such possibility was often regarded as "a hugely complicating factor" by arbitral tribunals. *See e.g.*, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Award, dated 25 November 2015, para. 234-236 (taking into account the participation of the European Commission to reach a decision on costs, that were split evenly, even if the respondent State had won the case on the merits).

[525] For instance, EU Member States also took the alternative or additional position that intra-EU BITs had been automatically terminated by operation of Article 59 of the VCLT. In this regard, arbitral tribunals have often relied on the existence of an alleged procedural requirement requiring a notification to cause the termination. *Eastern Sugar B.V. (Netherlands) v. The Czech Republic, SCC Case No. 088/2004*, Partial Award, dated 27 March 2007, para. 126. For the view that such notification is not required by the VCLT *see Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Statement of Dissent of Professor Marcelo Kohen, dated 3 February 2020, para. 9. The sections of this chapter will focus on the discussion on conflict rules.

[526] TFEU, Article 351.

While Article 351 *prima facie* merely refers to the relationships between EU Member States and non-Members, the CJEU has constantly interpreted it as applicable to resolve a conflict over the priority of agreements in the mutual relationship between EU Member States. For instance, in *Commission v. Austria* it held that:

> It is settled case-law that, whilst Article 307 EC [Article 351 of the TFEU] allows Member States to honour obligations owed to non-member States under international agreements preceding the Treaty, it does not authorise them to exercise rights under such agreements in intra-Community relations.[527]

In other words, intra-EU agreements are only applicable as long as they do not raise issues of incompatibility, which may arise whenever the intra-EU agreements relate to the same subject-matter.[528]

Significantly, the ILC Report also confirmed this interpretation, recognizing that the EU Treaties take "precedence over agreements that Member States have concluded between each other."[529]

At times, even arbitral tribunals *proprio motu* correctly identified the scope and the inevitable consequences that derive from Article 351 of the TFEU. For instance, in *Electrabel v. Hungary*, a case based on the ISDS provision in the ECT, the arbitral tribunal stated that:

> this interpretation of Article 307 to accord with international rules relating to the interpretation of successive treaties. It notes that the preeminence of EU law applies not only to pre-accession treaties between EU Members, but also to post-accession treaties between EU Members, as EU Members cannot derogate from EU rules as between themselves. There is therefore a significant coherence between EU law and treaties between EU Member States. . . . it follows, if the ECT and EU law remained incompatible notwithstanding all efforts at harmonisation, that EU law would prevail over the ECT's substantive protections and

[527] CJEU, *Commission v. Austria*, Case C-147/03, Judgment, dated 7 July 2005, para. 73. *See also* CJEU, Case 10/61, *Commission v. Italy*, Judgment, dated 27 February 1962, para. 10.
[528] *See* ILC Report, para. 254 ("[T]he test of whether two treaties deal with the "same subject matter" is resolved through the assessment of whether the fulfilment of the obligation under one treaty affects the fulfilment of the obligation of another.").
[529] *Id.*, para. 283.

> that the ECT could not apply inconsistently with EU law to such a national's claim against an EU Member State.[530]

Although it recognized that "the two legal orders share much in common" and that "the protection of foreign investors is clearly addressed by both the ECT and EU law," the tribunal concluded that the two treaties did not share the same subject-matter, thus excluding the applicability of Article 351 of the TFEU.[531]

In any event, the Tribunal held that, even if the two treaties had the same subject-matter, there was no inconsistency between EU law and intra-EU BITs and this would similarly preclude the implementation of the principle provided by Article 351 of the TFEU.[532] In particular, the Tribunal lengthy discussed the "concern of the European Commission [] to protect the ECJ's monopoly over the interpretation of EU law" but found that it was unjustified because the potential role of the CJEU was not completely excluded, taking into account its possible participation in the enforcement phase of the award.[533]

On a separate note, even the general conflict rule provided by the VCLT would imply the same consequences and it is based on similar requirements. More specifically, Article 30 of the VCLT reads as follows:

> 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

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[530] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, dated 30 November 2012, para. 4.186; *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Statement of Dissent of Professor Marcelo Kohen, dated 3 February 2020, paras. 13-21.
[531] *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, dated 30 November 2012, para. 4.176-4.177.
[532] *Id.*, para. 4.191.
[533] *Id.*, para. 4.146-4.154.

> 4. When the parties to the later treaty do not include all the parties to the earlier one:
> (a) as between States Parties to both treaties the same rule applies as in paragraph 3;
> (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.[534]

As can be seen from the above, this rule is the expression of the classic principle that *lex posterior derogate priori*.[535] Therefore, it specifically requires that one of the treaties postdates the other, together with the fact that the treaties should relate to the same subject matter. For the remaining aspects, Article 30(3) is the applicable paragraph in a situation of conflict when all the parties to a previous treaty are also parties to the later treaty, such as in the case of intra-EU BITs and EU law. The rule works exactly in the same way as Article 351 of the TFEU, because it applies as long as the provisions of the later treaty are not compatible with those of the earlier one.

With respect to the temporal element, while in the great part of cases there can be no doubt that the participation to the EU postdates the conclusion of the BIT, it must be noted that the Lisbon Treaty entered in force in 2009, *i.e.* undoubtedly after the conclusion of any intra-EU BIT.[536]

However, even in those cases in which respondents relied on Article 30 of the Vienna Convention, the arbitral tribunals often held that intra-EU BITs and EU Treaties did not relate to the same subject-matter and that they were incompatible with each other, as occurred in relation to the application of Article 351.

For instance, the arbitral tribunal in *Oostergetel and Laurentius v. Slovakia* imposed a high threshold to affirm that two treaties have the same subject-matter, unconvinced that "the safeguards offered by the [intra-EU BIT and the EU Treaties] are identical."[537] The tribunal recognized that there was "a certain degree of overlap between

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[534] VCLT, Article 30.
[535] ILC Report, paras. 223 ff.
[536] Incidentally, the Treaty of Lisbon included foreign direct investment among the areas of the EU common commercial policy. *See* TFEU, Article 207 ("The common commercial policy shall be based on uniform principles, particularly with regard to . . . foreign direct investment . . .").
[537] *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction, dated 30 April 2010, para. 76. *See also id.*, para. 104 (expressly referring to respondent's argument under Article 30 of the VCLT).

the two regimes in terms of substantive provisions applicable to any potential investment disputes," but it underlined that the fundamental distinction was the dispute settlement mechanism providing for investor-State arbitration.[538] Besides, the tribunal failed to acknowledge any "convincing reasons" in relation to the incompatibility of the BIT at issue and EU law principles, with particular regard to the prohibition of discrimination.[539]

The tribunal concluded its decision on the intra-EU objection affirming that it was not inclined to give priority to the EU treaties "considering the absence of any conclusive position of the EC or the ECJ on this question."[540]

While the position of the European Commission had been clear for a long time and would be specified in a variety of occasions,[541] the hoped-for "conclusive position" of the CJEU was finally explained in 2018, in a landmark decision that will be analyzed below.

2.2. The Judgment in the Achmea Case

The crucial judgment of the CJEU that will be examined in the following paragraphs concerned an investment arbitration case between a Dutch investor and Slovakia. The investment dispute arose from the decision of the Slovak government to reverse the liberalization of the country's private health insurance market, in which the Achmea Group – a multinational enterprise based in the Netherlands – operated through a local subsidiary.[542]

More specifically, the company regarded certain legislative measures taken after 2006 as a form of indirect expropriation, or in any event as a violation of several standards of treatment available under the applicable intra-EU BIT, including FET. Thus, it decided

[538] *Id.*, paras. 76-77.
[539] *Id.*, para. 86.
[540] *Id.*
[541] European Commission, Internal Market and Services DG, Note to the Economic and Financial Committee, dated November 2006; European Commission, Press Release, Commission asks Member States to terminate their intra-EU bilateral investment treaties, dated 18 June 2015 *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5198.
[542] *Achmea B.V. v. The Slovak Republic (formerly Eureko B.V. v. The Slovak Republic)*, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, dated 26 October 2010, paras. 1-9.

to start arbitral proceedings against Slovakia under Article 8 of the Netherlands-Czech and Slovak Republic BIT, an agreement concluded in 1991 – many years before the EU enlargement to Eastern European countries took place – in which Slovakia succeeded after the dissolution of the Czech and Slovak Federative Republic. In its relevant part, Article 8 reads as follows:

> 2. 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 on which either party to the dispute requested amicable settlement. . . .
> 5. The arbitration tribunal shall determine its own procedure applying the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules.
> 6. The arbitral tribunal shall decide on the basis of the law, taking into account in particular though not exclusively:
> –the law in force of the Contracting Party concerned;
> –the provisions of this Agreement, and other relevant agreements between the Contracting Parties;
> –the provisions of special agreements relating to the investment;
> –the general principles of international law."
> 7. The tribunal takes its decision by majority of votes; such decision shall be final and binding upon the parties to the dispute.[543]

Slovakia challenged the jurisdiction of the arbitral tribunal based on the incompatibility of intra-EU BITs and EU law. Over the course of the proceedings, it was also assisted by the European Commission, which filed written submissions covering the arguments raised with respect to the intra-EU objection.[544]

Similarly to other cases mentioned above, the arbitral tribunal in *Achmea v. Slovakia* dismissed the various grounds raised by the respondent State.[545] Significantly, the tribunal affirmed that issues of incompatibility between the BIT and EU law – if any

[543] Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, dated 29 April 1991, Article 8.
[544] The European Commission was invited by the arbitral tribunal to participate in the proceedings after a hearing on intra-EU objections had already taken place. *Achmea B.V. v. The Slovak Republic (formerly Eureko B.V. v. The Slovak Republic)*, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, dated 26 October 2010, para. 31. The Netherlands Government also submitted observations in line with the position of the Dutch investor.
[545] *Id.*, para. 293.

– would have been a question for the merits and irrelevant at the stage of determining jurisdiction.[546]

At the same time, it recognized that affording the intra-EU BITs protection to certain European investors while not affording it to others could have been considered as a violation of the EU non-discriminatory policy, but it held that such issue did not impinge on its jurisdiction.[547] It also made clear that if the ISDS system were by itself incompatible with EU law, the arbitral tribunal would have lacked jurisdiction to decide the dispute, but that was not the case.[548] Finally, it concluded its decision on the intra-EU objection by affirming that

> [t]he fact that, at the merits stage, the Tribunal might have to consider and apply provisions of EU law does not deprive the Tribunal of jurisdiction. The Tribunal can consider and apply EU law, if required, both as a matter of international law and as a matter of German law.[549]

Therefore, the case was allowed to proceed to the merits and the arbitral tribunal eventually decided the dispute in favor of the investor, awarding more than 20 million EUR for the damages suffered.[550]

Slovakia immediately started proceedings to set aside such award in Germany – where the arbitral tribunal had its seat – arguing that the arbitrators lacked jurisdiction because the ISDS clause in the BIT was invalid as a matter of EU law. After an adverse decision of the first instance court,[551] Slovakia decided to appeal the judgment in front of the German Federal Court of Justice, the highest court of ordinary jurisdiction in Germany.

The court was not fully convinced by the arguments raised by the respondent State; however, since the issue of the compatibility of intra-EU ISDS provisions with EU

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[546] *Id.*, para. 272.
[547] *Id.*, para. 266. The tribunal specifically found "no reason, legal or practical, why an EU Member State should not accord to investors of all other EU Member States rights equivalent to those which the State has bound itself to accord to investors of its EU bilateral investment treaty partners." *Id.*, para. 267.
[548] *Id.*, para. 273.
[549] *Id.*, para. 283.
[550] *Achmea B.V. v. The Slovak Republic (formerly Eureko B.V. v. The Slovak Republic)*, UNCITRAL, PCA Case No. 2008-13, Final Award, dated 7 December 2012, para. 352.
[551] Frankfurt Higher Regional Court, Decision, Case 26 Sch 3/13, dated 18 December 2014.

law had not been the object of a ruling of the CJEU yet and given the considerable importance of the issue, it concluded that it was necessary to refer certain questions to the CJEU.[552]

The scope of the inquiry of the CJEU was provided for in the request for the preliminary ruling and was limited to Articles 18, 267 and 344 of the TFEU and their compatibility with intra-EU investment arbitration. Therefore, the CJEU could not directly address the problems in relation to the overlap between substantial protections granted to investors under BITs and EU law. Besides, the tribunal admittedly did not rely on EU law in order to reach its decision on the merits.[553]

The decision of the CJEU was anticipated by the delivery of a strikingly firm opinion of the Advocate General, which affirmed that the EU Treaties did not prevent the application of the ISDS system.[554] In fact, Advocate General Wathelet, who noted the "fundamental importance" of the issue at stake, concluded that the overlap between the BIT and the EU treaties was only partial and that the application of Article 18 was not justified.[555] While holding that international arbitration between individuals and States did not undermine the allocation of powers fixed by the EU Treaties nor the autonomy of the EU system, he also took the view that arbitral tribunals formed under a BIT should be allowed to request preliminary rulings to the CJEU in order to safeguard the primacy of EU law.[556] Although the opinion of an Advocate General is not binding upon the Court, such conclusions were positively welcomed in the arbitration community, which regarded

[552] CJEU, Grand Chamber, Case C-284/16, *Slowakische Republik (Slovak Republic) v. Achmea BV*, Judgment, dated 6 March 2018 ('*Slowakische Republik (Slovak Republic) v. Achmea BV')*, para. 32. As known, national courts of last instance are under an obligation to refer questions of interpretation of EU law as long as (i) the question is relevant for the decision, (ii) a similar question has not been already subjected to a preliminary ruling, and (iii) there is no reasonable doubt as to the proper interpretation of EU law. *See* extensively MORTEN BROBERG AND NIELS FENGER, *Preliminary References to the European Court of Justice*, New York 2014, pp. 222 ff.
[553] *Achmea B.V. v. The Slovak Republic (formerly Eureko B.V. v. The Slovak Republic)*, UNCITRAL, PCA Case No. 2008-13, Final Award, dated 7 December 2012, para. 276.
[554] CJEU, Case C-284/16, *Slowakische Republik (Slovak Republic) v. Achmea BV*, Opinion of Advocate General Wathelet, dated 19 September 2017.
[555] *Id.*, para. 259.
[556] *Id.*, para. 131. Such idea was strongly refuted by the CJEU in the decision.

them as a decisive turning point for the admissibility of intra-EU investment arbitration as a matter of EU law.[557]

Before addressing the questions referred, the Court expressed certain general considerations that are at the core of the decision, as they guide and anticipate the reasoning applied to resolve the specific issues of the case at stake.

First, the Court recalled the principle of autonomy enshrined in Article 344 TFEU and the subsequent obligation upon Member States to subject disputes related to the application of EU law to the exclusive jurisdiction of the bodies of adjudication provided by the Treaties.[558] Thus, according to the Court, "an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system." [559]

This well-settled principle of EU law was already recalled by the CJEU within the *Opinion on the Accession of the EU to the ECHR*. In that context, the Court affirmed that the possibility that a dispute between Member States – or between Member States and the EU – could have been decided by the ECtHR even when the application of EU law was at issue, had been crucial to deny the compatibility between the dispute settlement's mechanisms of the two systems.[560] Furthermore, as discussed in the previous chapter, that same principle was the foundation of another critical decision of the CJEU in *Commission v. Ireland* in the context of the *MOX Plant* case, where it relied on the autonomy of the EU legal order and on the necessity to exclude possible interferences from other adjudicating bodies.[561]

[557] *See e.g.*, *ECJ Adviser Gives Thumbs-Up to Intra-EU BITs*, in *Global Arbitration Review*, dated 19 September 2017.
[558] TFEU, Article 344 ("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.").
[559] *Slowakische Republik (Slovak Republic) v. Achmea BV*, para. 32.
[560] CJEU, Opinion 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, dated 18 December 2014, para. 201. *See also* CJEU, Opinion 1/09, *Draft agreement - Creation of a unified patent litigation system*, dated 8 March 2011.
[561] CJEU, Grand Chamber, Case C-459/03, *Commission of the European Communities v. Ireland*, Judgment, dated 30 May 2006, para. 154. *See also* § II.2.3.

Notably, the CJEU subsequently confirmed this principle in the *Opinion on the Comprehensive Economic and Trade Agreement*, a new-generation investment treaty concluded between Canada, of the one part, and the European Union and its Member States, of the other part. In fact, the Court confirmed that an international tribunal can be compatible with the principle of autonomy as long as it is not tasked with the interpretation and the application of EU law.[562]

Second, the Court mentioned the "constitutional structure" of EU law as a justification of such principle, taking into account its fundamental features such as the primacy over Member States' laws and the direct effect, but also the principle of sincere cooperation based on the mutual trust between Member States.[563]

As already recalled in the first chapter, this is the type of language that has allowed the Court to use constitutional categories when interpreting the EU treaties, characterizing the actions of European institutions both in the internal and external dimension.[564] Indeed, the Court has stressed multiple times the peculiar nature of EU law with the aim of distinguishing it from other sources of international law, based on the large portions of sovereignty that Member States have given up to EU bodies.

Third, the Court devoted particular attention to the judicial system aimed at ensuring the uniform application of EU law and the "keystone" of that system, represented by the preliminary ruling procedure set out in Article 267 TFEU.[565] As affirmed in the judgment, the preliminary ruling procedure has a fundamental role since

> by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties.[566]

[562] CJEU, Opinion 1/17, *Comprehensive Economic and Trade Agreement*, dated 30 April 2014, paras 120 ff. (expressly distinguishing the agreement under its scrutiny and the intra-EU bit in the *Achmea* case).
[563] *Slowakische Republik (Slovak Republic) v. Achmea BV*, paras. 33-34.
[564] *See* § I.2.3.
[565] Slowakische Republik (Slovak Republic) v. Achmea BV, paras. 35-37.
[566] *Id.*, para. 37. *See* § II.3.2.

The Court also consolidated its extensive interpretation of Article 19 of the TFEU as a rule generally precluding the disempowerment of national courts, already addressed in another crucial judgment in *Associação Sindical dos Juízes Portugueses*, issued ten days before *Achmea*.[567]

Given these theoretical premises, well-established in the Court's case-law and at the core of the entire EU legal system, the outcome of the decision was based on a rather plain syllogism.

To simply put it, in the opinion of the Court, if a dispute involving a Member State may even potentially result in the application of EU law, it must be decided by a Court or a Tribunal inside the EU legal system, or in any case by a body of adjudication that is subject to review by such Court or Tribunal.

With respect to the first issue, the Court considered that it was unquestionable that an arbitral tribunal under Article 8 of the relevant BIT could potentially decide issues of EU law in a matter involving an EU Member State. In fact, the arbitration clause in the relevant BIT envisaged both national and international law as part of the applicable law. At the same time, EU law forms part of the domestic legal order of the State, with special regard to its secondary sources, but it also and primarily works as a set of international agreements between the Member States.[568]

From this point of view, the CJEU was particularly alarmed by "the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital," which, as recalled above, may overlap with the provisions of a BIT.[569]

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[567] *Id.*, para. 36; CJEU, Grand Chamber C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, Judgment, dated 27 February 2018. In that context, the CJEU further elaborated on the necessary independence of national courts and tribunals, whose impact on the critical situations of the judiciary in Poland and Hungary has been analyzed *inter alia* by MATTEO BONELLI AND MONICA CLAES, *Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses*, 14(3) *European Constitutional Law Review*, 2018, pp. 622 ff.

[568] *See* CJEU, Opinion 1/17, *Comprehensive Economic and Trade Agreement*, dated 30 April 2014, paras 120 ff (analyzing a treaty which expressly excluded the interpretation or the application of EU law).

[569] *Slowakische Republik (Slovak Republic) v. Achmea BV*, para. 42.

With respect to the second issue, the Court took in consideration the "exceptional nature" of jurisdiction under Article 8, which placed the arbitral tribunal outside the EU legal system, posing an obstacle to the uniform application of EU law. As a matter of fact, only courts and tribunals of a Member State "are subject to mechanisms capable of ensuring the full effectiveness of the rules of the EU."[570] Instead, the purpose of Article 8 was precisely to set an organ outside the legal orders of the two States, contrary to other dispute-resolution bodies common to multiple Member States that share major links with their judicial systems.[571]

More specifically, the settled case law of the CJEU prevents such an organ to submit a request for a preliminary ruling. As made clear in *Abrahamsson*, the jurisdiction of the referring body must be compulsory, while arbitral tribunals found their jurisdiction on the will of the parties, which may always agree to use a different dispute settlement mechanism.[572]

Notably, the *Achmea* judgment does not clarify whether an international arbitral tribunal under an intra-EU BIT could be considered as an independent body which applies rules of law for the purpose of establishing if it could be regarded as a Court or a Tribunal of a Member State. In light of the Court's still unfolding case law with respect to judicial independence,[573] it would have been interesting to assess these requirements in the

[570] *Id.*, para. 43.
[571] CJEU, Grand Chamber, Case C-337/95, *Parfums Christian Dior SA and Parfums Christian Dior BV v Evora BV*, Judgment, dated 4 November 1997, para. 6 (affirming that the Benelux Court of Justice may refer questions to the CJEU for a preliminary ruling).
[572] CJEU, Grand Chamber, Case C-407/98, *Katarina Abrahamsson and Leif Anderson v Elisabet Fogelqvist*, Judgment, dated 6 July 2000, para. 29 (specifying all the requirements as follows: "[T]he Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent."). *See also*, on the specific issue of the arbitral tribunals' lack of power to submit a request for preliminary reference, CJEU, Grand Chamber, Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*, Judgment, dated 23 March 1982, para. 16; CJEU, Grand Chamber, Case C-125/04, *Guy Denuit and Betty Cordenier v Transorient - Mosaïque Voyages et Culture SA*, Judgment, dated 27 January 2005, para. 16.
[573] *See* the recent landmark decision concerning the situation of Poland's judiciary. CJEU, Grand Chamber, Case C-585/18, *A. K. v. Krajowa Rada Sądownictwa*, Judgment, dated 19 November 2019, para. 120 ("That requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights

context of the critical discussion over the ISDS system and the perceived pro-investor bias.[574]

In any event, contrary to the opinion of the Advocate General, the Court confirmed that an arbitral tribunal established under a BIT cannot submit a request for a preliminary ruling.

Finally, the Court assessed whether an award issued under the applicable arbitration clause would be subject to review by a Court or Tribunal of a Member State, that could in turn request the intervention of the CJEU to clarify the interpretation of EU law, if necessary.

On one hand, the Court found that the arbitration clause gave the Tribunal the power to decide its seat,[575] thus enabling the arbitrators to place it outside the European Union, with the potential consequence of preventing any kind of judicial review in light of EU law. On the other hand, it underlined the limited extent of such a review, even in those cases in which it was admissible.[576]

In this regard, the Court distinguished the ISDS system provided by the BIT from commercial arbitration, whose standing under EU law had been already addressed in multiple cases by the CJEU, with positive outcomes.[577] The key difference between the two dispute settlement mechanisms, in the opinion of the Court, is that while commercial arbitration "originate[s] in the freely expressed wishes of the parties", ISDS is the result of an agreement between Member States, directed at "remov[ing] from their own courts" disputes potentially linked with EU law.[578] From this point of view, the parties to a

which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.").

[574] *See* § III.1.2.

[575] *Slowakische Republik (Slovak Republic) v. Achmea BV*, para. 52.

[576] *Id.*, para. 53.

[577] *See* CJEU, Case C-126/97, *Eco Swiss China Time Ltd v Benetton International NV*, Judgment, dated 1 June 1999 (clarifying that issues of EU law "should be open to examination by national courts when asked to determine the validity of an arbitration award and that it should be possible for those questions to be referred, if necessary, to the Court of Justice for a preliminary ruling.").

[578] *Slowakische Republik (Slovak Republic) v. Achmea BV*, para. 55.

contract are not bound to ensure the application of the EU law, while Member States have made such undertaking in the EU Treaties.[579]

At the same time, the CJEU clarified that its decision had no bearing on the possibility that an international agreement concluded by the EU could establish a court responsible for the interpretation of its provisions, "provided that the autonomy of the EU and its legal order is respected."[580]

Therefore, the Court was mainly concerned with the idea that two Member States could be part of an agreement with a detrimental effect on the full effectiveness of EU law, whose respect crucially depends on the mutual trust between Member States that their common values will be recognized.[581]

In light of the above and without having to address the consistency of the arbitration clause with Article 18 TFUE in relation to the prohibition of discrimination based on nationality, the Court thus concluded that:

> Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against

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[579] CJEU, Opinion 1/17, *Comprehensive Economic and Trade Agreement*, dated 30 April 2014, paras 120 ff ("The Member States are, in any area that is subject to EU law, required to have due regard to the principle of mutual trust. That principle obliges each of those States to consider, other than in exceptional circumstances, that all the other Member States comply with EU law, including fundamental rights."). *See also* CJEU, Opinion 1/91, *EEA Agreement (I)*, dated 14 December 1991 (stating that "An international agreement providing for such a system of courts is in principle compatible with Community law" but "in so far as it conditions the future interpretation of the Community rules on the free movement of goods, persons, services and capital and on competition the machinery of courts provided for in the agreement conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community.").

[580] *Slowakische Republik (Slovak Republic) v. Achmea BV*, para. 55.

[581] *See also* the key role of the principle of sincere cooperation. TEU, Article 4(3). ("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.").

> the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.[582]

2.3. The Initial Reaction to the Achmea Judgment

Although the judgment of the CJEU could not and should not be considered as a bolt from the blue – since the issue of intra-EU arbitration had been discussed for a long time and its outcome was determined on well-established case law, as seen above – it was immediately perceived by the arbitration community as a massive and sudden catastrophe for the ISDS system in the European Union context.[583] The day the *Achmea* judgment was issued has been regarded as the "black Tuesday" of investment arbitration in Europe.[584]

The general idea was that States would have consistently sought to set-aside awards based on such a strong issue of incompatibility and national courts would have been under an obligation to follow the judgment of the CJEU. At the same time, arbitral tribunals would have started to doubt their standing and the very possibility of rendering enforceable awards, which is one of the most important duties of any arbitrator.[585]

Furthermore, the scope of *Achmea* appeared not to be limited to the BIT in the underlying case, given the broad wording of the operative part of the judgment, stating that EU law precludes the application of provisions "such as" Article 8 of the Netherlands-Czech and Slovak Republic BIT. Therefore, it was affirmed that any intra-EU arbitration proceeding – even if arising from a multilateral agreement such as

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[582] *Id.*, Operative Part of the Judgment.
[583] *See e.g.*, SZILÁRD SZILÁGYI, *The CJEU Strikes Again in Achmea. Is this the end of investor-State arbitration under intra-EU BITs?*, in *International Economic Law and Policy Blog*, dated 7 March 2018; SERGIO PUIG, *The Death of ISDS?*, in *Kluwer Arbitration Blog*, dated 16 March 2018; FRANCESCO MUNARI AND CHIARA CELLERINO, *EU law is alive and healthy: the Achmea case and a happy good-bye to intra-EU bilateral investment treaties*, in *SIDI Blog*, dated 17 April 2018.
[584] NIKOS LAVRANOS, *Black Tuesday: the end of intra-EU BITs, in Practical law: Arbitration Blog*, dated 7 March 2018.
[585] *See* extensively GÜNTHER J. HORVATH, *The Duty of the Tribunal to Render an Enforceable Award*, 18(2) *Journal of International Arbitration*, 2001, pp. 135 ff. *See also Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, dated 31 August 2018, para. 230 (recognizing their "duty to render an enforceable decision and ultimately an enforceable award.").

the ECT – could be affected by the decision, as far as it was possible to apply the same reasoning adopted by the Court in *Achmea*.[586]

It was also suggested that the judgment could have had repercussions on ISDS' clauses in BIT between EU Member States and non-EU States. Indeed, it was argued that even in such extra-EU arbitrations the arbitral tribunals could have been entrusted with the interpretation and application of EU law in proceedings bought by non-EU nationals against an EU Member State.[587]

In October 2018, the German Federal Court of Justice, which had referred the issue of the compatibility of intra-EU ISDS with EU law to the CJEU, could not but recognize that the arbitration clause in the BIT was incompatible with EU law and that therefore the parties had not concluded a valid arbitration agreement.

Accordingly, it decided to set aside the award, thus precisely applying the principle affirmed by the CJEU.[588] This judgment further confirmed the impact that the *Achmea* judgment could have on intra-EU investment arbitration.[589]

These initial reactions to the judgment gave the impression that the implementation of the principle established in *Achmea* would have been straightforward and would have eventually caused the abandonment of the ISDS system at the European level. Besides, the *Achmea* judgment finally gave arbitral tribunals what they have been asked for: a "conclusive position" of the CJEU on the issue of the compatibility of intra-EU investment arbitration with EU law."[590]

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[586] PETER NIKITIN, *The CJEU's Achmea Judgment: Getting Through the Five Stages of Grief*, in *Kluwer Arbitration Blog*, dated 10 April 2018 ("The language of the Achmea judgment very clearly extends to all provisions 'such as' Article 8 of the Czechoslovak-Dutch BIT. That includes the ISDS provisions of the ECT, which is, therefore, extinguished, as between EU Member States, by operation of primacy.")

[587] QUENTIN DECLÈVE, *Achmea: Consequences on Applicable Law and ISDS Clauses in Extra-EU BITs and Future EU Trade and Investment Agreements*, 4(1) *European Papers*, 2019, pp. 99 ff. The author has no knowledge of proceedings in which a similar objection has been raised. Indeed, it could be argued that the principle of mutual trust recalled many times in the *Achmea* judgment would not operate in the relationship between an EU Member State and non-EU States.

[588] German Federal Court of Justice, Decision, Case I ZB 2/15, dated 31 October 2018.

[589] For an example of the reaction to the decision *see* TOM JONES, *Germany's top court shows obedience to Achmea*, in *Global Arbitration Review*, 2018.

[590] *Id.*

As time went by, however, the initial shock provoked by the judgment had gone and arbitral tribunals failed to follow the CJEU's findings on the possibility to arbitrate intra-EU investment disputes, as it will be detailed in the following section.

3. The Impact of *Achmea* in Perspective

3.1. The Decisions of Arbitral Tribunals after the Achmea Judgment

Respondent States immediately perceived the decisive importance of the *Achmea* judgment and urged arbitral tribunals to consider this development and decline jurisdiction accordingly. Similarly, the European Commission applied to submit *amicus curiae* briefs in several proceedings, with the aim of further clarifying the reasons of the incompatibility between the ISDS system and EU law. As a consequence, the *Achmea* judgment has been undoubtedly discussed at length in the context of investment arbitration in the last two years.

More specifically, since the CJEU issued the *Achmea* judgment on 6 March 2018, more than 30 arbitral tribunals in as many investment arbitration cases have taken a decision on the possibility that a European investor may bring a dispute against an EU Member State under an ISDS clause, having the opportunity to review the opinion of the CJEU in this regard.[591]

However, as further detailed below, none of these tribunals have upheld the intra-EU objections made by respondent States.[592]

Faced with a judgement that explicitly sanctioned the incompatibility of provisions "such as" Article 8 of the Netherlands-Czech and Slovak Republic BIT with EU law, the arbitral tribunals have attempted to distinguish their cases on multiple grounds.

[591] *See inter alia* the following contributions that have dealt with the implementation of the *Achmea* judgment: J. ROBERT BASEDOW, *The Achmea Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration*, 23 *Journal of International Economic Law*, 2020, pp. 271 ff.; MÉLIDA HODGSON AND EDELÌ RIVERA, UP and CD Holding Internationale v Hungary*: Achmea is Not the End of Intra-EU ICSID Arbitration*, *ICSID Review - Foreign Investment Law Journal*, 2020, pp. 1 ff.; IVANA DAMJANOVIC AND OTTAVIO QUIRICO, *Intra-EU Investment Dispute Settlement under the Energy Charter Treaty in Light of* Achmea *and* Vattenfall*: A Matter of Priority*, 26(1) *Columbia Journal of European Law*, 2019, pp. 102 ff.

[592] See, however, a dissenting opinion in this regard issued in February 2020. *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Statement of Dissent of Professor Marcelo Kohen, dated 3 February 2020.

For simplicity reasons, it is possible to identify three categories of decisions, putting aside the awards in which the arbitrators rejected to take into account the *Achmea* judgment on a mere procedural basis.[593]

A substantial number of decisions have been issued by arbitral tribunals established under the ISDS clause of the ECT, ultimately holding their jurisdiction on the basis of the purported difference between such multilateral agreement and intra-EU BITs.[594]

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[593] These are mainly decisions issued shortly after the *Achmea* judgment in cases where the jurisdictional phase had already been exhausted or the respondent had failed to raise jurisdictional objections timely. *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, dated 30 November 2018, para. 209; *Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Award, dated 15 June 2018, para. 58; *Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic*, PCA Case No. 2014-01, Award, dated 2 May 2018, para. 73; *Georg Gavrilovic and Gavrilovic doo v Republic of Croatia*, ICSID Case No ARB/12/39, Award, dated 25 July 2018, para. 76; *The PV Investors v. The Kingdom of Spain*, PCA Case No. 2012 14, Final Award, dated 28 February, 2020, para. 544. Such awards have also occasionally discussed the *Achmea* judgment, briefly dismissing its relevance. *See e.g.*, *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, dated 30 November 2018, para. 213 ("No *post-hoc* decision of the CJEU can somehow undo [the parties'] consent once given.").

[594] *See Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, dated 16 May 2018, para. 683; *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, dated 31 August 2018, para. 232; *Foresight Luxembourg Solar 1 S. Á.R1., et al. v. Kingdom of Spain*, SCC Case No. 2015/150, Final Award, dated 14 November 2018, para. 220; *Greentech Energy Systems A/S, et al v. Italian Republic*, SCC Case No. V 095/2015, Final Award, dated 23 December 2018, para. 403; *CEF Energia BV v. Italian Republic*, SCC Case No. 158/2015, Award, dated 16 January 2019, para. 100; *Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, dated 19 February 2019, para. 157; *Landesbank Baden-Württemberg and others v. Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the Intra-EU Jurisdictional Objection, dated 25 February 2019, para. 153; *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, ICSID Case No. ARB/14/11, Decision on Jurisdiction, Liability and Quantum Principles dated 12 March 2019, para. 357; *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, dated 7 May 2019, para. 186; *WA Investments-Europa Nova Limited (Cyprus) v. The Government of the Czech Republic*, PCA Case No. 2014 19, Award dated 15 May 2019, para. 460; *Voltaic Network GmbH v. The Government of the Czech Republic*, PCA Case No. 2014 20, Award, dated 15 May 2019, para. 370; *Photovoltaik Knopf Betriebs-GmbH (Germany) v. The Government of the Czech Republic*, PCA No. 2014 21, Award, dated 15 May

Other arbitral tribunals established under the ISDS clause of intra-EU BITs similarly affirmed their jurisdiction on the main ground that the *Achmea* judgment allegedly could not be relevant in the context of investment arbitration administered pursuant to the ICSID system.[595]

2019, para. 359; *I.C.W. Europe Investments Limited v. Czech Republic*, PCA Case No. 2014-22, Award, dated 15 May 2019, para. 418; *9REN Holding S.a.r.l v. Kingdom of Spain*, ICSID Case No. ARB/15/15, Award, dated 31 May 2019, para. 173; *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic*, ICSID Case No. ARB/17/14, Decision on the Intra-EU Jurisdictional Objection, dated 29 June 2019, para. 197; *SolEs Badajoz GmbH v. Kingdom of Spain*, ICSID Case No. ARB/15/38, Award, dated 31 July 2019, para. 252; *Belenergia S.A. v. Italian Republic*, ICSID Case No. ARB/15/40, Award, dated 6 August 2019, para. 334; *OperaFund Eco-Invest SICAV PLC and Scwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, dated 6 September 2019, para. 388; *BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directons on Quantum, dated 2 December 2019, para. 283; *Stadwerke Mûnchen GmbH, Rwe Innogy GmbH and Others v. Kingdom of Spain*, ICSID Case No. ARB/15/1, Award, dated 2 December 2019, para. 146; *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on jurisdiction, liability and certain issues of quantum dated 30 December 2019, para. 373; *Watkins Holding Sàrl, Watkins (Ned) B.V., Watkins Spain S.L., Redpier S.L., Northsea Spain S.L, Parque Eolico Marmellar S.L., and Parque Eolico La Boga S.L. v. The Kingdom of Spain*, ICSID Case No. ARB/15/44, Award dated 21 January 2020, para. 221; *Hydro Energy 1 S.à.r.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quatum dated 9 March 2020, para. 502; *Sunreserve Luxco Holdings S.à.rl. (Luxembourg), Sunreserve Luxco Holdings II S.à.rl. (Luxembourg), Sunreserve Luxco Holdings III S.à.rl. (Luxembourg) v. The Italian Republic*, SCC Case No. V 2016/32, Final Award, dated 25 March 2020, para. 444; *Cavalum SGPS, S.A. v. Kingdom of Spain*, ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, dated 31 August 2020, para. 370; *ESPF Beteiligungs GmbH, ESPF Nr. 2 Austria Beteiligungs GmbH, and InfraClass Energie 5 GmbH & Co. KG v. Italian Republic*, ICSID Case No. ARB/16/5, Award, dated 14 September 2020, para. 339.

[595] *UP and CD Holding Internationale v Hungary*, ICSID Case No. ARB/13/35, Award, dated 9 October 2018, para. 258; *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award dated 21 June 2019, para. 560; *Magyar Farming Company Ltd Kintyre Kft, and Inicia Zrt v. Hungary*, ICSID Case No. ARB/17/27, Award dated 13 November 2019, para. 210; *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, dated 7 February 2020, para. 187; *Strabag SE, Raiffeisen Centrobank AG and Syrena Immobilien Holding AG v. Republic of Poland*, ICSID Case No. ADHOC/15/1, Partial Award on Jurisdiction, dated 4 March 2020, para. 8.143; *Mr. Ion Micula, Mr. Viorel Micula, S.C. and others v. Romania*, ICSID Case No. ARB/14/29, Award dated 5 March 2020, para. 289; *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, dated 12 June 2020, para. 297. As a matter of fact, even arbitral tribunals established under the ECT have relied on the same reasoning, as long as the proceedings were managed under the ICSID system. *See e.g.*, *OperaFund Eco-Invest SICAV PLC and Scwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, Award, dated 6 September 2019, para. 387.

Finally, a few arbitral tribunals have denied the relevance of the *Achmea* judgment in arbitral proceedings based on intra-EU BITs, whether *ad hoc* or administered by institutions other than ICSID.[596]

The following sub-sections will review three emblematic decisions. They have been selected from each of the said categories as they have focused on the *Achmea* issue in detail and earlier than other tribunals in similar circumstances, thus constituting a model for arbitrators seeking to bypass the principles established by the CJEU. In particular, the scope of the analysis will be limited to the considerations of the tribunals with respect to the impact of *Achmea* on the intra-EU jurisdictional objections made by respondent States, with a focus on the applicable rules of conflict between inconsistent international obligations, in line with the examination of other decisions previously analyzed in this chapter.

i. Vattenfall AB and others v. Federal Republic of Germany

Vattenfall v. Germany is an intra-EU ISDS case arising from alleged breaches of the ECT brought by a Swedish company under the relevant arbitration clause of that agreement.[597] Significantly, the investment dispute concerned certain measures that Germany adopted in response to the Fukushima disaster, which allegedly damaged a Swedish investor operating in the nuclear sector. This controversy has once again sparked a wide discussion with respect to the opportunity of limiting the ability of a State to take measures in such sensitive sectors.[598]

[596] *GPF GP S.à.r.l v. Republic of Poland*, SCC Case No. V 2014/168, Award, dated 29 April 2020, para. 385; *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-1, Final Award, dated 11 May 2020, para. 414; *Muszynianka Spółka Z Ograniczoną Odpowiedzialnością (Formerly Spółdzielnia Pracy "Muszynianka") v. The Slovak Republic*, Award, dated 7 October 2020, para. 238.

[597] ECT, Article 26.

[598] AMÉLIE NOILHAC, *Vattenfall V. Germany (II) and the Familiar Irony of Isds: Investors Before Public Interest?*, in *Corporate Disputes*, 2015; IVANA DAMJANOVIC AND OTTAVIO QUIRICO, *Intra-EU Investment Dispute Settlement under the Energy Charter Treaty in Light of* Achmea *and* Vattenfall*: A Matter of Priority*, 26(1) *Columbia Journal of European Law*, 2019, pp. 102 (providing details over the dispute and taking the view that "applying German law and EU law rather than international investment law leads to prioritizing public interest over legitimate expectations of private investors, with significant implications in terms of compensation."). *See also* § III.1.2.

Following the *Achmea* judgment, Germany formalized a specific jurisdictional objection, and the tribunal asked the parties to comment on its implications, willing to address the issue in a separate and urgent decision. The European Commission was also allowed to update a brief which had been already submitted to support respondent's position, in light of the outcome of *Achmea*.[599]

The first issue addressed by the Tribunal in its August 2018 decision concerns the timeliness of Germany's objection. The Tribunal agreed with the State and considered the CJEU's judgment as a new fact – unknown to the parties until 6 March 2018 – thus capable of autonomously founding a reason to decline jurisdiction.[600] It even went further, affirming that, given the relevance of the question, it would have looked into it in the exercise of its *ex officio* powers, even in the absence of a specific objection, accordingly implying the seriousness and the importance of Germany's arguments.[601]

With respect to the relevance of EU law, the Tribunal held that the provision on the applicable law in the ECT, referring to the "rules and principles of international law,"[602] concerned only the merits of the dispute, while jurisdiction was a matter to be addressed solely on the basis of the treaty itself.[603] Notably, this would mean that the interpretation or application of EU law – as part of international law applicable between the parties – could instead be relevant to decide the merits of the dispute.[604]

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[599] *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, dated 31 August 2018, para. 16.
[600] *Id.*, paras. 95-103.
[601] *Id.*, paras. 104-107. *See also GPF GP S.à.r.l v. Republic of Poland*, SCC Case No. V 2014/168, Award, dated 29 April 2020, para. 315 ("The Tribunal can understand the Respondent's decision to raise the Achmea Objection only after the CJEU had delivered its judgment. The compatibility of intra-EU BITs with EU taw has been extensively debated in EU and investment taw for a long time. In light of this controversy, the Respondent's choice to wait until the CJEU had finally resolved the issue under EU law was not unreasonable.")
[602] ECT, Article 26.
[603] *Vattenfall AB and others v. Federal Republic of Germany*, para. 121.
[604] Generally, arbitral tribunals have concluded in the same way with respect to the applicable law on the merits of the issue. *See inter alia Asset Holding GmbH v. Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, dated 2 December 2019, para. 283 ("[T]he Tribunal concludes that its jurisdiction is not pre-empted by the Achmea decision. This conclusion does not mean that European law, in particular state aid law, is irrelevant to the merits of the present dispute."). *Contra Cube Infrastructure Fund SICAV and others v. Kingdom of Spain*, ICSID Case No. ARB/15/20, Decision on Jurisdiction, Liability and Partial Decision on Quantum, dated 19 February 2019, para. 158 (affirming that the EU law does

Germany and the European Commission had proposed an alternative approach in their submissions, which would have allowed to take into account EU law in the interpretation of the ECT, on the basis of Article 31(3)(c) of the VCLT. As known, such provision authorizes the use of "any relevant rules of international law applicable in the relations between the parties" as an interpretative mean of a treaty.[605]

The Tribunal agreed with the respondent State and the European Commission on the fact that – pursuant to the terms of Article 38 of the ICJ Statute – EU law constitutes a part of international law and that, consequently, the interpretation of the EU Treaties by the CJEU is as well as relevant for the purposes of Article 31(3)(c).[606]

Ultimately, however, the Tribunal reached the conclusion that it was not possible to interpret the ECT in a way that would exclude its jurisdiction on the sole basis of the findings in *Achmea*, even applying the rules of interpretation proposed.

First, the Tribunal made clear that the scope of the VCLT's provision was not "to rewrite the treaty being interpreted" in a way that would have the effect to reverse the ordinary meaning of its terms.[607] In this respect, the Tribunal further noted that allowing to interpret a treaty in a way that is possible only with respect to those Contracting Parties that are also Member States of the EU would "bring uncertainty and entail the fragmentation of the meaning and application of treaty provisions."[608]

Second, the Tribunal expressed its doubts on the possibility that the CJEU's judgment could have any meaningful effect on the ISDS clause of the ECT. Indeed, it recalled that the *Achmea* judgment did not specifically mention the ECT and that it was an "open question" whether the wording of the Court, referring to provisions "such as" the one of the BIT in the underlying case, could be said to have consequences on a multilateral system such as the ECT.[609] While acknowledging that there was "a certain

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not form part of the applicable law under Article 26 of the ECT but still recognizing that "provisions on EU law concerning State aid . . . as part of the factual basis for determinations of how the Claimants could expect to be treated.").

[605] VCLT, Article 31(3)(c).

[606] *Vattenfall AB and others v. Federal Republic of Germany*, para. 150.

[607] *Id*., para. 154.

[608] *Id*., para. 155.

[609] For an account of the history of the negotiations of the ECT suggesting that the parties to the agreement accepted the application of the ECT in intra-EU relations *see* J. ROBERT BASEDOW,

breadth" in the formulation chosen by the CJEU,[610] the arbitrators therefore concluded that:

> legal certainty requires that any relevant rule of international law that is taken into account during interpretation be clear. It is not for this Tribunal to extrapolate from the ECJ Judgment and declare a new rule of international law which is not clearly stated therein, or to decide which other scenarios would pose the same EU law concerns as those that the ECJ found in relation to the Dutch-Slovak BIT.[611]

Having exhausted the discussion in relation to the interpretation of the ECT, the Tribunal proceeded to dismiss the arguments raised by Germany with respect to the primacy of EU law over the ECT, having particular regard to the *lex posterior* principle established by Article 30 of the VCLT and further confirmed by Article 351 of the TFEU.[612]

In this regard, the tribunal denied that the conflict rules proposed could have had an impact on its jurisdiction.

Preliminarily, the arbitrators refused to recognize the very existence of a conflict between the EU Treaties and the ECT, as a consequence of their restrictive interpretation of the *Achmea* judgment already mentioned before. According to the tribunal, the ISDS provision in the treaty at issue and Articles 267 and 344 of the TFEU "do not have the

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The Achmea Judgment and the Applicability of the Energy Charter Treaty in Intra-EU Investment Arbitration, 23 *Journal of International Economic Law*, 2020, pp. 271 ff. Nonetheless, it is questionable that the intention of the parties to a treaty signed in 1994 could have an impact on the resolution of a conflict with the Treaty of Lisbon, concluded in 2007.

[610] *Id*., para. 161. Other decisions arising in the ECT context have reached similar results. *See e.g.*, *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, ICSID Case No. ARB/14/1, Award, dated 16 May 2018 para. 682 (relying on the – inconsequential as a matter of EU law – Opinion of Advocate General Wathelet to distinguish multilateral investment treaties from BITs).

[611] *Id*., para. 164. *See*, however, *Eskosol S.p.A. in liquidazione v. Italian Republic*, ICSID Case No. ARB/15/50, Decision on Italy's Request for Immediate Termination and Italy's Jurisdictional Objection based on Inapplicability of the Energy Charter Treaty to Intra-EU Disputes, dated 7 May 2019, para. 184 (stating that "even if the Achmea Judgment were to be construed as a matter of EU law to extend to the ECT, and not just to BITs similar to the one actually before the CJEU, that would not deprive this Tribunal of jurisdiction to decide this case" on the grounds that the conclusions of a Court in a different legal order do not bind a tribunal in a different one).

[612] Germany also argued that EU law should have prevailed on the ECT because it constituted an amendment of the latter treaty, pursuant to Article 41(1)(b) of the VCLT. *Id*., para. 215. Coherently with the previous sections, the analysis will focus on conflict issues, given the significant overlap between these two arguments.

same subject matter or scope" and "are capable of operating in their separate spheres without conflict," while the decision of the CJEU "did not go so far as to pronounce upon intra-EU investor-State arbitration under the ECT."[613]

With respect to the specific rules relied upon by the respondent State, the tribunal doubted that the EU Treaties could be considered as a later treaty, since such treaties have existed in a similar form and were binding upon Germany even prior to the conclusion of the ECT.[614]

Furthermore, the tribunal read Article 351 of the TFEU as a rule applicable to agreements between EU Member State and non-EU Member States and failed to take into account the interpretation of this provision given by the CJEU and recalled elsewhere.[615]

Finally, even though the arbitrators were "mindful of the duty to render an enforceable decision and ultimately an enforceable award," they refused to take into account the consequences of the *Achmea* judgment on enforceability, affirming that such matter did not relate to their jurisdiction.[616]

As a result of the decision on the *Achmea* issue, the case proceeded to the merits phase and is currently still pending in front of the tribunal.[617]

The most problematic aspect of this decision is that ISDS under the ECT cannot be so easily distinguished from the general concept of intra-EU investment arbitration with respect to its prominent features highlighted by the CJEU in *Achmea*.

As a matter of fact, cases such as *Vattenfall* may require the application of EU law – as acknowledged by the arbitrators – and are not subject to the interpretative control of the CJEU, in light of the well-established interpretation of Article 267 of the TFEU. Crucially, they also originate from an agreement between Member States which poses the

[613] *Vattenfall AB and others v. Federal Republic of Germany*, paras. 212-213.
[614] *Id.*, para. 218.
[615] *Id.*, para. 226 (stating that "a significant amount of interpretation" is required to derive the outcome sought by Germany.). *See* § III.2.2.
[616] *Vattenfall AB and others v. Federal Republic of Germany*, para. 230.
[617] Notably, Germany has made two proposals to disqualify the members of the tribunal on the grounds of alleged lack of impartiality and independence, but the same have been rejected based on the recommendations of the Secretary General of the Permanent Court of Arbitration. *See Vattenfall AB and others v. Federal Republic of Germany*, Recommendation on the Second Proposal to Disqualify the Tribunal, dated 6 July 2020.

adjudicating bodies deciding investment disputes outside the legal order of the Member States. Besides, when it distinguished its case from *Achmea* based on the nature of the ECT, the tribunal did not take into account that in that judgment the CJEU relied on a jurisprudence arising from multilateral treaties and not limited to bilateral agreements.[618]

The tribunal, however, did not engage with the substance of *Achmea* but merely listed formal differences between the ECT and intra-EU BITs. The substantial analysis of the rules of conflict in international law can be regarded as an *obiter dictum*, since such analysis has no significance unless it is based on the existence of an actual incompatibility between the legal orders at issue.

Finally, the soundness of the reasoning in the *Achmea* judgment is apparent from the fact that the arbitrators had to rely on the lack of an express reference to the ECT in *Achmea*. Admittedly, in cases of doubt with respect to the interpretation of EU law – or a CJEU judgment forming part of that law – an arbitral tribunal cannot refer the matter to the CJEU, as it could have been done by a national court in a similar case. Erring in such interpretation has the potential of nullifying the entire arbitral process. However, while the tribunal appeared to acknowledge the issues in relation to the enforceability of its decisions in light of future developments in EU law, it decided, nevertheless, to run such risk.

ii. UP and CD Holding Internationale v Hungary

UP and CD Holding Internationale v Hungary is an intra-EU arbitration case arising from alleged breaches of the France-Hungary BIT, a treaty concluded in 1986, before the collapse of the Eastern Bloc.[619] The dispute concerned certain measures taken by the Hungarian Government with respect to the taxation of food vouchers. Crucially, those same measures were already found by the CJEU to be illegitimate as a matter of EU law.[620]

[618] *See e.g.*, CJEU, Opinion 1/91, *EEA Agreement (I)*, dated 14 December 1991.
[619] Agreement between the French Republic Government and the Hungarian Republic Government on the Encouragement and the Reciprocal Protection of Investments, dated 6 November 1986 ('France-Hungary BIT').
[620] *See* CJEU, Case C-179/14, *European Commission v Hungary*, Judgment, dated 23 February 2016, para. 173.

In the opinion of the investors, the tax measures also constituted an indirect expropriation of their investment under the BIT.[621] Therefore, they brought a case against the State in front of a tribunal established under the framework of the ICSID Convention, one of the venues provided for by the BIT for the resolution of investment disputes in connection with expropriation.[622]

In this context, it has to be noted that the ICSID Convention probably represents the most important multilateral investment treaty, ratified by 155 States and entered into force in 1966 under the auspices of the World Bank.

The ICSID Convention does not provide *per se* any kind of substantial obligations upon States – such as BITs and other IIAs usually do – but sets out an institution with the aim of providing facilities for the arbitration of investment disputes. Therefore, the possibility to resort to the ICSID system is only available if a State has given its explicit consent to ICSID arbitration in another IIAs or in a contract.

Two fundamental aspects of the ICSID Convention are crucial to understand the position of the tribunal on the intra-EU objection in this case.

First, ICSID is a self-contained system because tribunals do not have a seat in any domestic jurisdiction. Thus, there are no available remedies against an ICSID award in front of national courts.[623] The only limited review procedure available is the annulment of awards decided by an *ad hoc* Committee appointed by the ICSID Chairman of the Administrative Council, a body which also operates inside the ICSID system.[624]

In addition, while a national court is ordinarily required to verify the existence of certain conditions before enforcing an international arbitral decision, this process is not

[621] *UP and CD Holding Internationale v Hungary*, ICSID Case No. ARB/13/35, Award, dated 9 October 2018, paras. 1-4.
[622] France-Hungary BIT, Article 9.
[623] ICSID Convention, Article 53(1) ("The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention.")
[624] *See id.*, Article 52.

envisaged in the context of arbitrations under the auspices of the ICSID.[625] Indeed, States that have ratified the ICSID Convention are under the legal obligation to

> recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.[626]

Therefore, the ICSID Convention is specifically designed to exclude the possibility that national courts may review ICSID awards. In the words of one of the "architects" of the ICSID Convention, such treaty was precisely meant to establish a "complete, exclusive and closed jurisdictional system, insulated from national law."[627]

As in manifold other cases, following the *Achmea* judgment, Hungary immediately asked the ICSID tribunal to take into consideration the position of the CJEU and decline jurisdiction.[628] The parties had the occasion to extensively discuss the issue, while the tribunal denied the European Commission's application to intervene in the proceeding.[629]

At the outset, the tribunal made the following statement which forged its entire decision:

> the Tribunal does not consider that a detailed discussion of the substance of *Achmea* is required, because the present case differs in determinative aspects from the case in *Achmea*.[630]

In fact, the principles and the rationale of the *Achmea* judgment are not addressed in the decision, which merely lists the characteristics that purportedly distinguishes ICSID arbitration from *ad hoc* arbitration, the form of dispute settlement in the investment dispute underlying the *Achmea* case.

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[625] Non-ICSID investment awards are subject to the ordinary procedures of enforcement provided for international arbitral awards, just as in the context of international commercial arbitration. *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 UNTS 38, dated 10 June 1958.
[626] ICSID Convention, Article 54.
[627] ARON BROCHES, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2(2) *ICSID Review – Foreign Investment Law Journal*, 1987, p. 288.
[628] *UP and CD Holding Internationale v Hungary*, para. 89.
[629] *Id.*, paras. 90-94, 98.
[630] *Id.*, para. 252.

The reasoning of the tribunal is primarily based on the alleged different position of ICSID tribunals in the international legal order. More specifically, the tribunal stated that:

> contrary to that in the Achmea case, this Tribunal's jurisdiction is based on the ICSID Convention. i.e. a multilateral public international law treaty for the specific purpose of resolving investment disputes between private parties and a State (here, Hungary). Thus, this Tribunal is placed in a public international law context and not in a national or regional context.[631]

In addition, according to the arbitrators, ICSID tribunals – as opposed to *ad hoc* tribunals which are bound to choose a seat that shall govern the issues in relation to the review and the enforcement of the arbitration award – are not subject to any legal order, to the extent that they should be only compelled to respect the ICSID Convention and the ICSID Arbitration Rules.[632]

Similarly to the decision in *Vattenfall v. Germany*, the award relied upon the fact that the *Achmea* judgment did not contain any reference to ICSID arbitration and that such judgment could not be interpreted in a way that supported the arguments raised by the respondent State.[633]

Finally, the tribunal affirmed that the ICSID Convention was still binding upon Hungary in the absence of an explicit or implicit denunciation of the treaty on its part, assuming that its jurisdiction mainly depended on the application of that agreement. At the same time, according to the arbitrators, even if the France-Hungary BIT was superseded by Hungary's accession to the EU, investors could still benefit of the treaty protection, including the redress to international arbitration, on the basis of the so-called survival clause in the treaty.[634]

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[631] *Id.*, para. 253.
[632] *Id.*, para. 253.
[633] *Id.*, para. 254.
[634] *Id.*, para. 265. *See also* France-Hungary BIT, Article 12(2). Survival clauses – also known as sunset clauses – are provisions that extend the protection of IIAs after their termination for a certain period of time. However, the effects of these clauses in the context of the intra-EU objections is highly debatable, since – at least when the case was decided – intra-EU investment agreements had not been *formally* terminated and their operation was prevented on account of an interpretation of those agreements in line with rules and principles of international law, including

Once it dismissed the jurisdictional objection based on *Achmea*, the Tribunal proceeded to the merits of the case, deciding the dispute in favor of the investors and awarding the two French companies more than 25 million USD.[635]

The outcome of this case is particularly interesting because the arbitration clause on which the tribunal based its jurisdiction was contained in a BIT – such as in the *Achmea* case – and the parties widely referred to issues in relation to EU law, including the CJEU's judgment in the voucher affair at the basis of claimants' allegations of expropriation.[636]

Nevertheless, the tribunal did not address in any way the rationale of the CJEU pronouncement on intra-EU investment arbitration. Instead, almost paradoxically, the arbitrators focused on the special nature of ICSID arbitration in a way that ends up reinforcing the arguments raised by the CJEU in *Achmea*.

In fact, the decision made several references to the fact that an ICSID tribunal is placed outside any legal order and is only subject to the ICSID Convention rules and remedies. However, this fundamental feature of international arbitration was specifically stigmatized by the CJEU in the judgment, since it could potentially lead to an inconsistent and incoherent interpretation of EU law in contrast with the principle of its full effectiveness.[637] In other words, the mere choice of a different *forum* under an otherwise apparently similar ISDS clause should not affect the reservations made by the CJEU in

EU law. *See* § III.3.3 for further discussion on survival clauses and their effect in the context of intra-EU investment arbitration.

[635] *Id.*, para. 623. It is of note that the arbitrators discussed the weight of a decision in a similar case based on the same BIT and affirmed that it could only "shed useful light" on the issues but did not bind them. *See also* MÉLIDA HODGSON AND EDELÌ RIVERA, UP and CD Holding Internationale v Hungary*: Achmea is Not the End of Intra-EU ICSID Arbitration, ICSID Review - Foreign Investment Law Journal*, 2020, pp. 8-9 ("Rejecting any degree of precedent, however, particularly where the treaty is the same and the facts and parties are substantially similar, has the potential to exacerbate inconsistency in a system in which concerns about unpredictability are a battle cry for opponents of investment arbitration.").

[636] *See* CJEU, Case C-179/14, *European Commission v Hungary*, Judgment, dated 23 February 2016.

[637] CJEU, Grand Chamber, Case C-284/16, *Slowakische Republik (Slovak Republic) v. Achmea BV*, Judgment, dated 6 March 2018, para. 43.

Achmea with respect to the possibility that two Member States may jeopardize the uniformity in the interpretation of EU law by depriving EU Courts of their role.[638]

iii. A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic

A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic is an intra-EU arbitration case arising from alleged breaches of the Czech and Slovak Republic-Germany BIT, an agreement concluded in 1990 in which the Czech Republic succeeded after the dissolution of the Czech and Slovak Federative Republic, in a similar way to the Slovak Republic with respect to the agreement with the Netherlands in the *Achmea* case.[639]

According to the investor, Czech bankruptcy administrators wrongly included planes of its property in the bankruptcy proceedings started against a Czech company that had leased the planes, in alleged violation of several standards of treatment provided for by the BIT.[640] Therefore, it brought an investment claim against the State on the basis of the ISDS clause of the treaty, which did not include a reference to the ICSID system, but only to *ad hoc* international arbitration.[641] The tribunal formed under the BIT chose the PCA as the administering authority and designated as the seat of the arbitration Zurich, Switzerland, outside the reach of EU Member States' national courts.[642]

Following the *Achmea* judgment, the respondent State asked the tribunal to bifurcate the proceedings to decide the intra-EU objections as a preliminary question, on account of the CJEU's decision. While the tribunal denied such request,[643] the parties and

[638] MÉLIDA HODGSON AND EDELÌ RIVERA, UP and CD Holding Internationale v Hungary*: Achmea is Not the End of Intra-EU ICSID Arbitration*, *ICSID Review - Foreign Investment Law Journal*, 2020, p. 7 ff. ("It is possible that this conclusion may create an unintended discord resulting from the provision of, and selection between, arbitration rules in BITs. Arguably, a result is that intra-EU investors bringing claims under treaties that provide for both ICSID and UNCITRAL rules, at the investor's selection, or ICSID-only arbitration, are favored. This is simply the luck of the draw. Nonetheless, it is likely that the treaty drafters did not intend this consequence.")

[639] Treaty between the Federal Republic of Germany and the Czech and Slovak Federal Republic Concerning the Promotion and Reciprocal Protection of Investments, dated 2 October 1990 ('Czech and Slovak Republic-Germany BIT').

[640] *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-1, Final Award, dated 11 May 2020, para. 260.

[641] Czech and Slovak Republic-Germany BIT, Articles 9-10.

[642] *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, para. 146.

[643] *Id.*, para. 191.

the European Commission – which was granted the possibility to intervene as a non-disputing party[644] – had ample opportunities to discuss the relevance of *Achmea*.

Contrary to the two decisions previously analyzed, this tribunal issued its award at a time in which the European Commission and the Member States had already taken several measures in light of the *Achmea* judgment. Therefore, it was preliminarily necessary to address the issues arising from these actions as to the validity of the arbitral agreement, an aspect that will be dealt with below.[645]

Thereafter, the tribunal conducted an analysis of the necessary conditions to apply rules of conflicts under general international law, reaching the same conclusion of other arbitral tribunals. Since the EU treaties and the relevant BIT did not purportedly have the same subject matter, such conditions were not met, according to the arbitrators, who specifically affirmed that:

> The potential simultaneous application of EU law and the Germany-Czech Republic BIT to the same set of facts or that they both might afford protection to the same investors under certain circumstances is not sufficient to conclude that they relate to the same subject matter.[646]

As to the relevance of the *Achmea* judgment, the arbitral tribunal noted that the conclusions of the CJEU were based on the applicable law clause in the specific BIT analyzed by the Court. However, the Czech and Slovak Republic-Germany BIT did not contain an applicable law clause at all. Thus, the tribunal could decide the dispute in accordance with the BIT and general principles of international law which, in the opinion of the arbitrators, did not include EU law.[647] Accordingly, the tribunal found that the cases were distinguishable.

In any event, the arbitral tribunal was of the opinion that the *Achmea* judgment would not have been binding upon it, even though the CJEU is the institution tasked with the interpretation of EU law and had already ruled on the incompatibility of intra-EU ISDS clauses and the EU institutional framework. In fact, the tribunal stated that:

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[644] *Id.*, para. 216.
[645] *See* § III.3.3.
[646] *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, para. 361.
[647] *Id.*, paras. 374-375.

> a tribunal situated on the international plane, such as the present Arbitral Tribunal, is not bound by the position adopted by the CJEU, which is a court within a regional sub-system of international law.[648]

Finally, the tribunal also took into account the role of the principle of comity and the possibility to decline jurisdiction on that basis.[649] Although recognizing its usefulness as a tool to coordinate situations in which different regimes overlap, the tribunal underlined that comity "remains a discretion-driven device, which cannot impose precise obligations on international courts and tribunals."[650]

Accordingly, the tribunal upheld its jurisdiction and decided the case on the merits, rejecting claimant's claims with respect to the substantial violations of its rights under the BIT.[651]

The outcome of this proceeding is even more remarkable than the previous ones, because the situation was apparently more similar to the *Achmea* case, since the jurisdiction of the arbitral tribunal was based on an intra-EU BIT and the ICSID Convention was not involved.

However, the arbitrators did not recognize the impact of the CJEU and its understanding of the conflict between BITs and EU law. Instead, as correctly pointed out in a dissenting opinion in another intra-EU arbitration case, the *Achmea* judgment

> is an authoritative interpretation of EU Treaties and of their impact on other rules of international law, *i.e.* the BITs concluded by EU Member States at a time one of the parties to those treaties was not a member of the EU. It is a short view approach to contend that since the CJEU decided on the basis of EU Law, then its decision has a limited scope for the question at issue here, which is placed on a broader scenario of international law. The CJEU analysed the question of the compatibility of prior conventional engagements of EU Member States with EU Treaties and came to the conclusion that they are not.[652]

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[648] *Id.*, para. 378.
[649] *See* § II.3.2.
[650] *Id.*, para. 409.
[651] *Id.*, para. 709.
[652] *Theodoros Adamakopoulos and others v. Republic of Cyprus*, ICSID Case No. ARB/15/49, Statement of Dissent of Professor Marcelo Kohen, dated 3 February 2020, para. 6.

Furthermore, the arbitrators' decision on the relevance of the *Achmea* judgment is not entirely convincing, albeit, contrary to other decisions, the tribunal attempted to deal with the substance of the CJEU's reasoning. Indeed, it affirmed that the judgment was only applicable as long as a dispute is governed even in part by EU law, thus excluding the applicability to the case at hand, in light of its finding on the applicable law.

However, the interpretation given to the provision of the Czech and Slovak Republic-Germany BIT conveniently differs, for instance, from the one in the *Achmea v. Slovakia* dispute underlying the *Achmea* judgment, where the arbitral tribunal recognized that "EU law appears to fall within the scope of . . . the general principles of international law."[653]

As a matter of fact, the ISDS clause in the Czech and Slovak Republic-Germany BIT do not expressly exclude the possibility that an arbitral tribunal could interpret or apply EU law, possibly harming the principle of autonomy. Besides, under the applicable procedural rules, the tribunal could have decided to apply EU law in the absence of an agreement between the parties.[654]

The *Achmea* judgment established that ISDS clauses within intra-EU BITs were incompatible with EU law because arbitral tribunals deciding investment disputes *may* have to apply EU law, not only in those cases in which they *must*.[655] Therefore, the distinction proposed by the arbitral tribunal does not seem to be relevant for excluding the Czech and Slovak Republic-Germany BIT from the application of the principles stated by the CJEU in *Achmea*.

Notably, other tribunals have proposed a similar incoherent argumentation to distinguish their cases from the *Achmea* judgment. For instance, it has been stated that the principles established therein cannot be relevant when it is not necessary to apply or

[653] *Achmea B.V. v. The Slovak Republic (formerly Eureko B.V. v. The Slovak Republic)*, UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, dated 26 October 2010, para. 289.
[654] UNCITRAL Rules, Article 35(1).
[655] CJEU, Grand Chamber, Case C-284/16, *Slowakische Republik (Slovak Republic) v. Achmea BV*, Judgment, dated 6 March 2018, para. 42.

interpret EU law in practice, even if the latter forms part of the applicable law pursuant to the BIT.[656]

3.2. The Approach of Domestic Courts

Other than in the framework of arbitral proceedings, the *Achmea* judgment has been discussed in front of domestic courts as a reason to set aside or deny the enforcement of awards issued by tribunals established under intra-EU IIAs, precisely as occurred in the case underlying the CJEU's decision.[657]

However, at present, no court at the European level has upheld the so-called *Achmea* objection, while in a number of cases enforcement has been suspended, pending a decision on the merits of the set aside.[658]

Significantly, in a decision concerning the enforcement of an award against Poland, the Svea Court of Appeal has rejected the objection of the State on a procedural basis, although affirming that the circumstances of the case were the same of those in *Achmea* "in all material aspects."[659]

The main reason of such decision is that the objection to jurisdiction based on the incompatibility with EU law had not been raised timely in the arbitration proceedings. The Court of Appeal interpreted *Achmea* in a peculiar way, affirming that:

> TFEU thus does not preclude arbitration agreements between a Member State and an investor in a particular case, a Member State is, based on party autonomy, free – even though the Member State

[656] *GPF GP S.à.r.l v. Republic of Poland*, SCC Case No. V 2014/168, Award, dated 29 April 2020, para. 378 ("It is true that an arbitral tribunal resolving a dispute in application of an investment treaty may have to address, as preliminary or incidental issues, matters involving the interpretation or application of the EU Treaties. Whether such a situation might give rise to a conflict can be left open, as the claims raised here include no such matters.")

[657] German Federal Court of Justice, Decision, Case I ZB 2/15, dated 31 October 2018. In this regard, *see* a recent contribution specifically dedicated to the analysis of set aside proceedings in the aftermath of the *Achmea* judgment: JULIAN SCHEU AND PETYO NIKOLOV, *The setting aside and enforcement of intra-EU investment arbitration awards after Achmea*, 36(2) *Arbitration International*, 2020, pp. 253 ff.

[658] *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, Svea Court of Appeal, Judgment, 16 May 2018; *CEF Energia BV v. Italian Republic*, Svea Court of Appeal, Judgment, dated 24 April 2019; *Greentech Energy Systems A/S, et al v. Italian Republic*, Svea Court of Appeal, Judgment, dated 28 March 2019.

[659] *PL Holdings v Poland*, Svea Court of Appeal, Judgment (Unofficial Translation), dated 22 February 2019, p. 41.

> is not bound by a standing offer as such as that in article 8 of the Achmea case or article 9 in this case –to enter into an arbitration agreement with an investor regarding the same dispute at a later stage, *e.g.* when the investor has initiated arbitral proceedings.[660]

The approach adopted by the Svea Court of Appeal takes in consideration the findings of *Achmea* but reaches a different result on the basis of a seemingly creative interpretation of the distinction made by the CJEU between commercial and investment arbitration. [661]

In the absence of a timely objection on the part of the State, the Court argued that the agreement to arbitrate was concluded on account of Poland's waiver of its jurisdictional objections, in accordance with Swedish law.

It is true that the principle enshrined in *Achmea* seems to be without prejudice to specific agreements between the parties of an international arbitration proceeding, according to the well-settled case law of the Court with respect to commercial arbitration. However, the assumption that a tacit arbitration agreement was concluded by the time Poland did not raise a specific objection to jurisdiction is at least doubtful.

First, as affirmed in *Vattenfall*, the judgment of the CJEU constitutes a fact occurred after the initiation of the arbitral proceedings, capable of supporting *per se* an objection to the jurisdiction as it represents a new assessment of the relationship between EU law and ISDS.[662]

Second, the assumption that the intra-EU objection could be waived would also run counter the rationale of the *Achmea* judgment, since it would mean that EU Member States could – over the course of a dispute and not in a previous specific contract with the investors – agree to the submission of investment claims raised under an intra-EU BIT to an arbitral tribunal outside the EU legal order, while the ISDS clause in the respective intra-EU BIT agreement having the same effect would still be considered incompatible

[660] *Id.*, pp. 44-45.
[661] CJEU, Grand Chamber, Case C-284/16, *Slowakische Republik (Slovak Republic) v. Achmea BV*, Judgment, dated 6 March 2018, para. 55.
[662] *Vattenfall AB and others v. Federal Republic of Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea Issue, dated 31 August 2018, paras. 95-107.

with fundamental principles of EU law. Such reasoning would completely bypass the judgment of the CJEU.

In the aftermath of the Court of Appeal's judgment, Poland challenged it in front of the Swedish Supreme Court, which in turn decided to submit a request for a preliminary ruling to the CJEU in order to assess the compatibility of this theory with EU law.[663]

Once again, this development highlights the main problem with intra-EU investment arbitration. While Swedish Courts are part of the EU system and may request the assistance of the CJEU whenever in doubt with respect to the interpretation of a EU law or even of a single judgment such as *Achmea*, arbitral tribunals deciding investment disputes are placed outside this legal order and are excluded from the preliminary procedure provided for by Article 267 of the TFEU.

Therefore, as shown before, they could not submit their doubts concerning the relevance of *Achmea* to the only organ that is legitimately capable of clarifying them. Ultimately, EU Courts will be mainly responsible for the implementation of the *Achmea* judgment and ensure the full effectiveness of EU law.[664]

At the same time, it must be noted that investors also have the possibility to enforce arbitral awards in non-EU jurisdictions, where EU law issues may be perceived as less relevant compared to proceedings in front of EU Courts, thus frustrating these expectations.[665] Further, non-EU courts do not have the necessary expertise to address complex problems arising from the institutional frameworks of the EU.

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[663] CJEU, Case C-109/20 Request for a preliminary ruling from the Högsta domstolen (Sweden), dated 27 February 2020. ("Do Articles 267 and 344 TFEU, as interpreted in Achmea, mean that an arbitration agreement is invalid if it has been concluded between a Member State and an investor — where an investment agreement contains an arbitration clause that is invalid as a result of the fact that the contract was concluded between two Member States — [despite the fact that] the Member State, after arbitration proceedings were commenced by the investor, refrains, by the free will of the State, from raising objections as to jurisdiction?"). The decision of the CJEU is expected in 2021.

[664] Notably, the Svea Court of Appeal has recently denied Spain's request to submit to the CJEU the issue of the relevance of *Achmea* in the context of disputes started on the basis of the ECT. *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, Svea Court of Appeal, Decision, dated 27 May 2020.

[665] *See e.g.* the attempt to enforce one of the above-mentioned awards in the US, *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, Petition to confirm an arbitral award, US District Court for the District of Columbia, dated 16 May 2018.

For example, a US Court of Appeal has recently confirmed that an arbitral agreement is valid and should not be considered affected by the *Achmea* judgment.[666] The reasoning of the US Court is based on the fact that the alleged violations underlying the investment claim in the case at stake occurred before the accession of the respondent State to the EU. It is not clear how such issue could affect the rationale of the CJEU's judgment, which did not discuss the relevance of the circumstances in relation to the time of the violation of protection standards and merely underlined the incompatibility of intra-EU ISDS clauses, precluding their operation between *current* EU Member States, such as the respondent State in the case discussed by the US Court.

3.3. The Reactions of the European Commission and EU Member States

A few months after the *Achmea* judgment, the European Commission publicly took the position that:

> all investor-State arbitration clauses in intra-EU BITS are inapplicable and that any arbitration tribunal established on the basis of such clauses lacks jurisdiction due to the absence of a valid arbitration agreement. As a consequence, national courts are under the obligation to annul any arbitral award rendered on that basis and to refuse to enforce it.[667]

With respect to the scope of the *Achmea* judgment and its potential relevance for multilateral agreements, the European Commission specifically concluded that the reasoning of the CJEU could also be applied in the context of the ECT, which would similarly open the possibility to submit disputes to a body outside the judicial system of the EU.[668]

On a separate note, the European Commission extensively dealt with the protection of intra-EU investments under EU law, with the aim of explaining the existent

[666] *Ioan Micula et al v. Government of Romania*, US District Court for the District of Columbia, Judgment, dated 19 May 2020.
[667] Communication from the Commission to the European Parliament and the Council, Protection of intra-EU investment, COM (2018) 547 final, dated 19 July 2018, p. 3, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2018:0547:FIN.
[668] *Id.*

legal framework on which EU investors could rely on independently from the *Achmea* judgment.[669]

At the same time, the Commission clarified the implications of the judgment upon EU Member States, which were under an obligation to *formally* terminate intra-EU BITs, pursuant to the principle of legal certainty.[670]

As a matter of fact, in the months immediately following the *Achmea* judgment, a number of States had already begun to publicly announce that they would have terminated their BITs with other EU Member States,[671] but in January 2019 the EU Member States collectively reiterated the consequences flowing from the CJEU's judgment, even if in a threefold way.

The then 28 Member States issued three different declarations.

The first declaration was signed on 15 January 2019 by 22 Member States.[672] It explains the consequences of the *Achmea* judgment as follows:

> [A]ll investor-State arbitration clauses contained in bilateral investment treaties concluded between Member States are contrary to Union law and thus inapplicable. They do not produce effects including as regards provisions that provide for extended protection of investments made prior to termination for a further period of time (so called sunset or grandfathering clauses). An arbitral tribunal established on the basis of investor-State arbitration clauses lacks jurisdiction, due to a lack of a valid offer

[669] *Id.* ("Without being exhaustive, this Communication recalls the most relevant substantive and procedural standards in EU law for the treatment of cross-border investments in the EU. It shows that EU law protects all forms of EU cross-border investments throughout their entire life cycle. It recalls the obligation on Member States to ensure that national measures they may take to protect legitimate public interests do not unduly restrict investments. It draws the attention of investors to the EU rights they may invoke before administrations and courts.").
[670] *Id.*
[671] *See e.g.*, Letter from the Dutch Minister for Foreign Trade and Development Cooperation to the Chairperson of the Dutch House of Representatives, dated 26 April 2018, *available at* https://www.rijksoverheid.nl/documenten/kamerstukken/2018/04/26/kamerbrief-over-investeringsakkoorden-met-andere-eu-lidstaten.
[672] The 22 Member States include Austria, Belgium, Bulgaria, Czech Republic, Croatia, Cyprus, Denmark, Estonia, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Netherlands, Poland, Portugal, Romania, Slovakia, Spain, UK.

> to arbitrate by the Member State party to the underlying bilateral investment Treaty.[673]

Thus, the declaration effectively bars any possible use of the ISDS system in intra-EU BITs, specifying that provisions extending the protection of IIAs after their termination for a certain period of time cannot be relied on by EU nationals with a view to reviving investment arbitration clauses. Further, the declaration also explicitly mentions that:

> international agreements concluded by the Union, including the Energy Charter Treaty, are an integral part of the EU legal order and must therefore be compatible with the Treaties. Arbitral tribunals have interpreted the Energy Charter Treaty as also containing an investor-State arbitration clause applicable between Member States. Interpreted in such a manner, that clause would be incompatible with the Treaties and thus would have to be disapplied.[674]

The main declaration is followed by a list of nine actions – including the termination of all intra-EU BITs before December 2019 – which Member States committed themselves to adopt with the aim of addressing the issue.[675]

A second declaration, signed the following day by five other Member States,[676] echoes the positions and the commitments of the first one, but does not share its firm stance with respect to the consequences of the *Achmea* judgment on the ISDS clause of the ECT. More specifically, the second declaration notes that the interpretation of that clause and in particular its compatibility with EU law has been contested before the

[673] Declaration of the Member States on the legal consequences of the Achmea judgment and on investment protection, dated 15 January 2019, *available at* https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en., p. 1.
[674] *Id.*, p. 2.
[675] *Id.*, pp. 3-4.
[676] Declaration of the Member States on the legal consequences of the Achmea judgment and on investment protection, dated 16 January 2019, *available at* https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf. The 5 Member States are Finland, Luxembourg, Malta, Slovenia and Sweden, which unsurprisingly include States whose nationals are involved in investment arbitration (*e.g.*, Sweden, as seen before). However, the other declaration signed by 22 Member States has also the support of traditionally capital-exporting States (*e.g.*, Netherlands).

national courts of a Member State.[677] Therefore, according to this group of States, it would be "inappropriate, in the absence of a specific judgment on this matter, to express views" on the applicability of the ISDS clause in the ECT.[678]

Finally, Hungary issued a separate declaration, similarly underlining the "importance of allowing for due process" with respect to the decision on the compatibility of EU law with the ISDS clause of the ECT and that also differs from the other declarations since it does not provide a commitment to withdraw investment arbitration cases brought by Member States-controlled entities.[679]

While the said declarations are not entirely consistent with respect to the consequences of the *Achmea* judgment on the ISDS clause of the ECT, they surely evidenced the general unity in the approach of the Member States and the Commission, directed at giving full application to the decision of the CJEU, at least in the context of investment arbitration cases brought under intra-EU BITs.

Respondent States have brought the declarations to the attention of arbitral tribunals, suggesting, for example, that they constituted an authentic interpretation of EU law pursuant to Article 31(3)(b) of the VCLT.[680] However, arbitral tribunals have not considered them as decisive as one could have imagined, even if they were issued by the "Masters of the Treaties."[681]

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[677] The reference is to the set aside proceedings pending in front of Swedish Courts and already mentioned above. *See Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. The Kingdom of Spain*, Svea Court of Appeal, Decision, dated 27 May 2020.

[678] Declaration of the Member States on the legal consequences of the Achmea judgment and on investment protection, dated 16 January 2019, *available at* https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf.

[679] Declaration of the representative of the Government of Hungary on the legal consequences of the Achmea judgment and on investment protection in the European Union, dated 16 January 2019, *available at:* https://www.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf.

[680] VCLT, Article 31(3) ("There shall be taken into account, together with the context . . . (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.").

[681] RICHARD POWER, *The (Final?) Death of Intra-EU Investor-State Arbitration*, in *Kluwer Arbitration Blog*, dated 28 January 2019.

For instance, in *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic* the arbitral tribunal underlined that the declarations were mere "expressions of the political will of EU Members States to comply with their obligations flowing from EU law as interpreted and defined by the Achmea Judgment."[682] Further, according to the arbitrators, the declarations mention other actions that would be supposedly undertaken in the future but do not have an interpretative value, notwithstanding the statements quoted above on the validity of the offer to arbitrate disputes in intra-EU BITs.[683]

In addition, the tribunal relied on the fact that the EU Member States committed to terminate intra-EU BITs – an action that was required by the European Commission for the purpose of legal certainty – to imply that the declarations considered that further actions will be required to achieve any result.[684] Finally, the arbitral tribunal expressed its doubts on the possibility of retroactively interfering on the right to arbitrate granted to private parties, even though the EU Treaties – whose interpretation was merely clarified by the CJEU and the Member States in 2018 and 2019 – predated the request for arbitration.[685]

Ultimately, on 5 May 2020, two years after the *Achmea* judgment, 23 Member States signed the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union ('Agreement for the Termination of intra-EU BITs').[686]

[682] *A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic*, PCA Case No. 2017-1, Final Award, dated 11 May 2020, para. 336.
[683] *Id.*
[684] *Id.*, para. 338.
[685] *Id.*, paras. 337-338.
[686] Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, dated 5 May 2020. The EU Member States that have not signed the treaty are Austria, Finland, Ireland, and Sweden. The United Kingdom has also not signed such agreement. The European Commission has already urged Finland and the United Kingdom – upon which EU law continues to apply during the transition period – to terminate their BITs with other EU Member States. TOM JONES, *UK and Finland face legal action over intra-EU BITs*, in *Global Arbitration Review*, dated 14 May 2020.

Under Article 16, the Agreement for the Termination of intra-EU BITs will enter into force for each contracting party 30 days after the date of deposit by such contracting party of an instrument of ratification, approval or acceptance.[687]

Such plurilateral treaty has the effect of terminating all the BITs between the contracting parties and, for greater clarity, to deprive of any legal effect any provision extending the protection of investments made prior to the date of termination of a BIT for a further period of time.[688]

The Member States signing the Agreement for the Termination of intra-EU BITs also specify that:

> Arbitration Clauses are contrary to the EU Treaties and thus inapplicable. As a result of this incompatibility between Arbitration Clauses and the EU Treaties, as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member State of the European Union, the Arbitration Clause in such a Bilateral Investment Treaty cannot serve as legal basis for Arbitration Proceeding.[689]

The Agreement for the Termination of intra-EU BITs is without prejudice to arbitral proceedings that have already been concluded and enforced before the *Achmea* judgment was issued on 6 March 2018.[690] With respect to the other investment arbitration cases – including those in which an award had already been issued at the date of the entry into force of the agreement – the contracting parties have agreed to establish a number of transitional measures, which do not affect the aim of depriving ISDS clauses of any legal effect.[691]

The preamble of the Agreement for the Termination of intra-EU BITs also removes any doubt concerning its applicability in the context of institutional arbitral proceedings as opposed to *ad hoc* ones, expressly stating that ICSID-administered

[687] Currently, 7 EU Member States have ratified the treaty (Bulgaria, Denmark, Croatia, Cyprus, Hungary, Malta, Slovakia). *See* Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, Ratification Details, *available at* https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2019049&DocLanguage=en
[688] *Id.*, Articles 1 and 2.
[689] *Id.*, Article 4.
[690] *Id.*, Article 6.
[691] *Id.*, Articles 8-10.

proceedings are covered by the treaty.[692] At the same time, the scope of the Agreement for the Termination of intra-EU BITs is limited to intra-EU BITs and does not address arbitral proceedings under the ECT, a matter which the contracting parties agreed to discuss at a later stage.[693]

It is clearly too soon to evaluate the impact of the Agreement for the Termination of intra-EU BITs on the ISDS system.

However, it must be noted that intra-EU investment claims have been filed even after the conclusion of the agreement, as a demonstration of the strong confidence of investors in the fact that the ISDS system will continue to be available in the European context.[694] At the same time, as the analysis of previous decisions has confirmed, the reaction of arbitral tribunals cannot be taken for granted.

In fact, an arbitral tribunal has recently affirmed that the Agreement could not impinge on its jurisdiction because the termination of intra-EU BITs could operate only for the future, disregarding the common understanding of the contracting parties as to the legal effects of ISDS clauses.[695]

Therefore, it seems that the Agreement for the Termination of intra-EU BITs surely represents a turning point, but the interplay between EU law and investment arbitration is far from being a problem of the past.

[692] *Id.*, Preamble.
[693] *Id.*
[694] COSMO SANDERSON, *Ad agency brings treaty claim against Czech Republic*, in *Global Arbitration Review*, dated 17 September 2020.
[695] *Muszynianka Spółka Z Ograniczoną Odpowiedzialnością (Formerly Spółdzielnia Pracy "Muszynianka") v. The Slovak Republic*, Award, dated 7 October 2020, para. 263.

4. Conclusion

The peculiarity of the *Achmea* judgment is that it represents the clash of two different tendencies, which have been presented in the first two chapters.

On one hand, the CJEU, the "guardian" of the full effectiveness of EU law under Articles 267 and 344 of the TFEU, has played an essential role in the so-called constitutionalization process of the European Union, in accordance with its aim of safeguarding the uniform application of EU law. In particular, the decisions of the Court have shaped the EU institutional framework in its internal dimension, while also emphasizing the crucial nature of the principle of autonomy in its external dimension.

On the other hand, the ISDS system – whose fundamental features have been described in the first section of this chapter – may be considered as the perfect example of fragmentation, a term that has come to assume different meanings, but seems to quite fit current developments in the field. Not only international investment law is one of the many arising branches whose growth has attracted the interest of international law scholars in the last decades, but it has given rise to a widely used system of adjudication in which every tribunal is sovereign and released by almost any sort of control.

The *Achmea* judgment lies at the core of the inevitable conflict between this disordered network of arbitral tribunals and the centralizing nature of the CJEU.

For about ten years, arbitrators have discussed the impact of the interplay between the pervasive EU legal system and the rules concerning foreign investment, always confirming their jurisdiction pursuant to the ISDS clauses in intra-EU IIAs. Then, the CJEU concluded that such clauses were substantially incompatible with EU Treaties.

As seen above, the decision of the CJEU was grounded on foundational principles of the EU legal order and its constitutional structure. Ultimately, Member States cannot outsource the resolution of their disputes concerning EU law to private bodies, since, as underlined by the President of the Court:

> any Member State should in principle be confident that, in the fields covered by Union law, the judicial system of the other

> Member States ensures effective legal protection within the meaning of Article 19 TEU.[696]

Basically, the *Achmea* judgment was yet another in a long series of stances of the CJEU implying that the Court itself must have the last word in relation to the interpretation of EU law, in order to preserve the coherence of the EU legal system and the mutual trust between Member States.

The authoritativeness of the CJEU was initially viewed as an insurmountable obstacle to intra-EU investment arbitration.

However, numerous decisions have questioned the relevance of the judgment. The last section of this chapter has shown that a large number of arbitral tribunals – formed in accordance with ISDS clauses in bilateral and multilateral agreements between EU Member States – has upheld its jurisdiction in the last two years. The reasoning adopted by the arbitrators was not particularly persuasive, since they often attempted to escape the substantial problems raised by the CJEU by merely pointing out formal differences between the cases they were deciding and the case underlying the *Achmea* judgment. Most importantly, the arbitral decisions often conceded that the judgment's implications were doubtful, thus corroborating the rightfulness of the CJEU's approach. An adjudicating body outside the EU legal order will interpret and apply EU law – including a judgment such as *Achmea* – without the possibility of having the interpretation clarified in the right venue.

The direct reaction of EU Member States in their capacity of masters of the treaties has not been as successful as expected, since the recent practice shows a certain reluctance of arbitral tribunals in recognizing the effects of the January 2019 declarations and the May 2020 Agreement to terminate intra-EU BITs.

In this context, the best option available to the EU Member States could be to rely on the mutual trust to which the CJEU referred in the *Achmea* judgment, entrusting domestic courts with the application of the principles established therein. In due course,

[696] KOEN LENAERTS, *Upholding the Rule of Law through Judicial Dialogue*, 38 *Yearbook of European Law*, 2019, p. 10.

if necessary, the CJEU could also intervene to clarify the more problematic issues, as requested by the Swedish Supreme Court.

At the same time, investors can potentially avoid that an EU Member Court will review such awards by enforcing them in non-EU jurisdictions.

In conclusion, it appears that – far from putting an end to the divergence between fragmentation and constitutionalization – the *Achmea* judgment has strengthened such tension, posing further challenges to the coordination of international law regimes.

CONCLUSIONS

The crucial importance of international courts and tribunals has been a recurring topic in this thesis.

The first chapter has underlined that international adjudicating bodies are at the core of several strands in the Global Constitutionalism's academic discourse. Despite the difference between the approaches, it is possible to conclude that the exercise of a judicial function plays an essential role in the observation of constitutional qualities beyond the State.

From this point of view, some critical remarks are necessary.

It is evident that the protection of fundamental rights and the separation of powers – two key aspects of any form of constitutionalism – cannot be safeguarded in the international domain as effectively as in the domestic one.

By way of illustration, the analysis of the ICJ's role within the UN Charter context has shown the limits of its jurisdiction, which occasionally prevented the Court from intervening on crucial issues, specifically in relation to the broad powers of the UN Security Council.

From a different angle, normative approaches to Global Constitutionalism rely on judicial activism to advance certain agendas, further enhancing human rights. However, their objectives depend on the discretion of the international judiciary, which may potentially embrace them only in a distant future, as it seems to be the case with respect to the investment law regime.

At the same time, international courts and tribunals are always at risk of being deprived of their functions and their legitimacy can be seriously questioned, primarily in the absence of adequate standards of impartiality and independence. The downward spiral of the Appellate Body – previously regarded as the "crown jewel" of the WTO system– is an explicit reminder of States' prerogatives in this field.

This thesis has stressed out that international litigation is inherently based on States' consent and aimed at safeguarding worldwide peace through the resolution of

disputes involving sovereign parties. Therefore, States will continue to have a wide margin of appreciation in defining the scope of action of international jurisdictions.

Hence, the ideas of Global Constitutionalism did not find a strong confirmation in the survey carried out in the first chapter, but they may still constitute a useful prism to appreciate constitutional nuances in the dynamics of international relations.

Indeed, the direction taken by certain sub-systems of international law cannot be ignored. The EU legal framework – whose main achievements are mostly attributable to the CJEU's interpretation of the EU Treaties – could represent a working model for the constitutionalization in the international realm, even though the circumstances of its development are rather unique.

Further, the emergence of regional and sectoral regimes, albeit presenting constitutional features, does not necessarily have positive effects on the overall structure of international law, as evidenced by the debate on fragmentation.

The second chapter has shown that the diversification and expansion of the international legal order and the proliferation of international jurisdictions may have multiple implications on the consistency and the coherence of the system.

First, given the growing number of overlapping jurisdictions, there is an increasing risk that different adjudicating bodies may be asked to decide the same subject-matter. Therefore, the same dispute could have inconsistent outcomes. This possibility may in turn frustrate the expectations of the parties to a proceeding and constitute a burden on the litigation of international disputes.

Second – even when the subject-matter is not the same – the existence of a plurality of jurisdictions, many of which operating in the same field, entails that different interpretations may be given of the same or similar rules applied in a decision-making context. While this situation could be inevitable in light of the creative role of judges in the development of international law, it may however lead to an unbearable legal uncertainty.

The prospective solutions advanced to deal with these issues may have some merits and could prove successful in the future. Nevertheless, their implementation is

complicated by the consensual nature of international adjudication, which often leaves little room for maneuver.

The overview of the ISDS system carried out in the first section of the third chapter has revealed that international investment law is especially exposed to the threat of fragmentation. In fact, the decision of investment disputes is entrusted to a plethora of arbitral tribunals established on the basis of a mosaic of treaties and could hardly give rise to a truly uniform framework. Additionally, the rules on foreign investment have been regularly interpreted in isolation from general international law, with the consequence of producing conflicting results in their application. Thereby, the fragmented nature of the law on the protection of foreign investments could be another critical factor undermining the legitimacy of the whole system, which has been strongly criticized over the last decade.

The remainder of the third chapter has specifically dealt with the debate over the compatibility of intra-EU investment arbitration with EU law. As explained in the introduction, the scope of this thesis was to frame the still unfolding saga ensuing from the *Achmea* judgment in the context of the approaches illustrated in the first two chapters.

On the one hand, a constitutional reading of the *Achmea* judgment seems to be in line with the intentions of the CJEU. The Court expressly mentioned the "constitutional structure" of the EU legal order and relied on the peculiar nature of EU law to prevent the application of arbitration clauses in intra-EU BITs. The key element of the decision is that Member States must refrain from acts that may undermine the fundamental principles of mutual trust and sincere cooperation. Outsourcing the task of resolving disputes that may entail the application of EU law would run counter the spirit of the EU treaties, in violation of the principle of autonomy. Thus, the aim of the *Achmea* judgment was to bring order in the chaotic system of investment arbitration.

On the other hand, the subsequent implementation of the judgment by arbitral tribunals can be considered as an example of the negative effects of fragmentation and of the proliferation of international jurisdictions. Arbitrators generally avoided to discuss the merits of the CJEU's decision, since they did not consider to be bound by the interpretation of the Court and they found that the disputes they were deciding had certain

questionably distinguishing features from the *Achmea* case. Therefore, the ISDS system has once again proven to be impervious to any attempt of submitting it to an external authority.

In conclusion, it appears that constitutional developments beyond the State are in a precarious position facing the issues of fragmentation, particularly in light of the elusive nature of the international judicial function.

For the time being, arbitral tribunals have quickly overcome the challenge represented by the CJEU's decision and the Court has not achieved its objective. It should be seen whether domestic courts will be in a position to implement the *Achmea* judgment, while the ongoing reaction of EU Member States – the "Masters of the Treaties" – has not been capable of influencing arbitrators until now.

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