The Future of Investment Treaty Arbitration in the EU

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Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment Court

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Ronan O'Reilly is an associate in the Dispute Resolution group of White & Case LLP in London. His practice involves international commercial arbitration, investment treaty arbitration and commercial litigation, covering a variety of sectors including energy, telecommunications, mining and financial services. He has represented a broad range of clients, including States, state entities and large corporations in complex disputes before the English courts and international tribunals under the rules of the major arbitral institutions (ICC, LCIA, SCC, ICSID, UNCITRAL and LMAA). He has experience of acting for clients in multi-jurisdictional enforcement proceedings and EU infringement proceedings. He also regularly advises on issues of sovereign immunity and disputes arising out of sovereign debt restructurings. Mr O'Reilly regularly speaks at events in the arbitration community on a range of topics and is a former Chair of the Chartered Institute of Arbitrators Global Young Members' Group.

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CHAPTER 11

Arbitration, Public Policy and Enforcement after *Achmea*: A Perspective from Singapore*

Alvin Yeo & Swee Yen Koh

In studying the repercussions of Achmea*, we focus on Singapore's perspective and explore the possible approaches which the Singapore courts, in their capacity as a supervisory and enforcement court, may adopt in dealing with jurisdictional challenges and public policy objections based on* Achmea *arguments. The implications of Achmea on ASEAN, a regional bloc of which Singapore is an important member, are also analysed. Finally, we examine the key provisions under recent EU-Singapore investment treaties and the ISDS mechanisms envisioned therein and contemplate the compatibility of such ISDS mechanisms with EU law in light of* Achmea.

§11.01 INTRODUCTION

To say that the decision of the CJEU in *Achmea* has sent shock waves through the investment arbitration community would not be an overstatement. The recent commentary on investment arbitration has, for the most part, been dominated by *Achmea*, its immediate impact and its implications in the long-term.[1] Investment arbitration

* The authors are grateful to Alexander Kamsany Lee and Brunda Karanam for the considerable assistance given in respect of the research and preparation of this Chapter.

1. *See* generally: Janice Lee, *The Empire Strikes Back: Case Note on the CJEU Decision in Slovak Republic v. Achmea BV*, 11 Contemporary Asia Arbitration Journal 137 (2018); Nikos Lavranos and Tania Singla, *Achmea: Groundbreaking or Overrated?*, 16(6) German Arbitration Journal 348 (2018); Csongor Istvan Nagy, *Intra-EU Bilateral Investment Treaties and EU Law after Achmea: Know Well What Leads You Forward and What Holds You Back*, 19 German Law Journal 19 (2018); Sanja V. Dajic, *The Achmea Cases – Story on Treaty Interpretation, Forum Competition*

tribunals have also not shied away in their decisions since *Achmea* from confronting issues raised by the CJEU's decision.[2]

But much of the critique (and, often, criticism) of the decision has been a shared European perspective. Little has been said from the perspectives of outsiders to what is widely discussed as a European issue. This Chapter offers one such perspective – from Singapore – with the hope of considering the potential implications of *Achmea* for the future of investment arbitration beyond intra-EU treaty arbitrations.

At the outset, it must be noted that there are thus far two reported decisions of the Singapore courts, exercising their supervisory jurisdictions, arising from investment arbitrations: *Sanum Investments Ltd v. Government of the Lao People's Democratic Republic*[3] (*Sanum*) and *Swissbourgh Diamond Mines (Pty) Ltd and others v. Kingdom of Lesotho*[4] (*Swissbourgh*). Nevertheless, it was noted by one tribunal seated under the auspices of the PCA that '[t]he arbitration law as well as the judiciary [of Singapore], should it become involved, are well equipped […] to deal with'[5] investor-State disputes notwithstanding its limited experience as compared to other jurisdictions.[6] Recent developments within the jurisdiction have also built Singapore's infrastructure to deal with investment arbitrations – not least, the confirmation of the jurisdiction of the Singapore International Commercial Court (SICC), comprising both international and local judges, to hear arbitration-related court proceedings.[7] This Chapter focuses on considering (§11.02) the principles laid down in *Achmea* from Singapore's perspective as a supervisory and enforcement court and as a member of the intergovernmental association, the Association of Southeast Asian Nations (ASEAN); and (§11.03) the future of EU-Singapore investment arbitration as well as the EU's new approach to ISDS, especially after *Achmea*.

§11.02 SINGAPORE'S PERSPECTIVE ON THE PRINCIPLES IN *ACHMEA*

This section deals with the reasoning and implications of *Achmea* from Singapore's perspective as a supervisory court, and how this may also impact enforcement

and International Law Fragmentation, 52(2) Zbornik Radova 52 (2018); Simon Burger, *Arbitration Clauses in Investment Protection Agreements after the ECJ's Achmea Ruling: A Preliminary Evaluation*, 6(1) Yearbook on International Arbitration 121 (2019); Tom Jones, *EU Countries to cancel BITs Post-Achmea*, Global Arbitration Review (17 January 2019), https://globalarbitrationreview.com/article/1179337/eu-countries-to-cancel-bits-post-achmea, last visited 26 April 2020.

2. *See* generally: *Masdar Solar & Wind Cooperatief U.A. v. Spain*, ICSID Case No. ARB/14/1, Award, 16 May 2018 (*Masdar v. Spain*); *Vattenfall v. Germany*, ICSID Case No. ARB/12/12, Decision on the Achmea issue, 31 August 2018 (*Vattenfall v. Germany*); *UP (formerly Le Chèque Déjeuner) and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, 9 August 2018 (*UP and CD Holding Internationale v. Hungary*).
3. [2016] 5 SLR 536.
4. [2019] 1 SLR 263.
5. *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012-12, Procedural Order No. 3, para. 38.
6. David Joseph QC and David Foxton QC, *Singapore International Arbitration: Law and Practice*, 512–513 (2nd ed., LexisNexis, 2018).
7. Supreme Court of Judicature (Amendment) Bill No. 47/2017, available at https://sso.agc.gov.sg/Bills-Supp/47-2017/Published/20171106?DocDate=20171106, last visited 6 May 2020.

proceedings in Singapore. It also explores the possible implications of *Achmea* from Singapore's perspective as a member of ASEAN.

[A] *The Likely View of Singapore Courts Towards the Jurisdictional Objections Raised in* Achmea

The first question that will be examined is this section is: how would the Singapore courts, in their supervisory capacity, have dealt with a dispute like the one in *Achmea*?

It goes without saying that a Singapore court is, unlike the CJEU, not a supranational court and it certainly would not be able to grant binding preliminary rulings on matters of EU law. Accordingly, the hypothetical situation envisioned in this section is one where the jurisdiction of a tribunal empowered by an intra-EU BIT is challenged in Singapore as the seat of the arbitration.

In *Achmea*, Slovak Republic had raised issues relating to the applicability and legality of Article 8 of the Netherlands-Slovakia BIT as jurisdictional objections before the Tribunal and as grounds for setting aside before the German Courts. In particular, Slovak Republic's objection of lack of jurisdiction of the arbitral tribunal was based on the argument that recourse to an arbitral tribunal provided for in Article 8(2) of the BIT was incompatible with EU law. The most analogous mechanisms available under Singapore law would be Section 10 of the Singapore International Arbitration Act (IAA)[8] for appeals on jurisdictional rulings of a tribunal to the Singapore High Court and Section 24 of the IAA, in conjunction with Article 34(2)(a)(iii) of the UNCITRAL Model Law for setting aside on the basis of excess of jurisdiction. Both these procedures permit the Singapore courts to review the jurisdiction of an arbitral tribunal on a de novo basis.

It is posited that the Singapore courts, acting pursuant to either of these mechanisms, might decide *Achmea* quite differently from the CJEU.

[1] Singapore's Approach to Investment Instruments

The paucity of case law in Singapore dealing directly with the jurisdiction of investment arbitration tribunals was already noted above. However, much can be gleaned from the approach taken by the Singapore courts in dealing with investment instruments, as set out in the Singapore Court of Appeal's decisions in *Sanum* and *Lesotho*.

Sanum dealt with a Section 10 IAA application brought by the Government of the Lao People's Democratic Republic (Laos) challenging an award that the tribunal had jurisdiction to hear disputes under the BIT between the People's Republic of China and Laos (PRC-Laos BIT).[9] The investor Sanum Investments Ltd (Sanum) was a Macanese company.[10] In 2012, Sanum commenced arbitration pursuant to the expropriation clause under Article 8(3) of the PRC-Laos BIT, alleging, among other things, that Laos

8. International Arbitration Act (Cap 143A, 2002 Rev. Ed.).
9. *Sanum*, para. 1.
10. *Ibid*.

had deprived it of the benefits to be derived from its capital investment through the imposition of unfair and discriminatory taxes.[11] Laos' challenge to jurisdiction rested on its contention that the PRC-Laos BIT did not protect Macanese investors and that the Tribunal lacked subject matter jurisdiction over Sanum's expropriation claims.[12] While the Singapore High Court had initially allowed the challenge, the Singapore Court of Appeal allowed the appeal against the decision of the High Court and dismissed the Section 10 IAA application. It held that by reason of the moving treaty frontiers rule,[13] the PRC-Laos BIT applied to Macau and that the Tribunal did have subject matter jurisdiction over Sanum's claims.[14]

Swissbourgh, on the other hand, dealt with a setting aside application under Section 24 of the IAA brought by the Kingdom of Lesotho against an award rendered by a tribunal under the auspices of the PCA.[15] Before the PCA arbitration was initiated, in June 2009, the investors had brought a claim under the South African Development Community (SADC) Treaty before a regional tribunal concerning Lesotho's alleged expropriation of the investors' mining leases. This tribunal was established to hear disputes regarding adherence to and interpretation of the SADC Treaty. However, that SADC tribunal was dissolved by resolution at a summit of the SADC before the claim could be heard.[16]

In response, the investors commenced arbitration in 2012 before the PCA pursuant to Article 28 of Annex 1 of the Protocol on Finance and Investment,[17] framing their claim against Lesotho for various breaches of international law relating to the shuttering of the SADC tribunal.[18] The award of the tribunal was in favour of the investors, and directed the establishment of a new tribunal, similar to the SADC tribunal that was shuttered, to hear the investors' claims.[19] Lesotho's setting aside action was premised on, among other things, the investors not having a protected investment under the Protocol on Finance and Investment and failing to exhaust local

11. *Ibid*., para. 6.
12. *Ibid*., paras 10, 22.
13. The ILC in its 1974 Commentary on Draft Article 14 (which became Article 15) of the 1978 Vienna Convention on State Succession in Respect of Treaties defines the 'moving treaty-frontiers' rule as follows: 'Shortly stated, the moving treaty-frontiers rule means that, on a territory's undergoing a change of sovereignty, it passes automatically out of the treaty régime of the predecessor sovereign into the treaty régime of the successor sovereign. It thus has two aspects, one positive and the other negative. The positive aspect is that the treaties of the Successor State begin automatically to apply in respect of the territory in question as from the date of the succession. The negative aspect is that the treaties of the Predecessor State, in turn, cease automatically to apply in respect of such territory as from that date.'
14. *Sanum*, paras 122, 151–152.
15. *Swissbourgh*, paras 1–2.
16. *See* https://lawgazette.com.sg/feature/lesotho-sets-aside-award-before-the-singapore-high-court/, last visited 4 May 2020.
17. In 2006, SADC signed a Protocol on Finance and Investment which granted protections to investors. Under Annex 1 to the Protocol, investors could commence international arbitration against signatory states if the dispute arose after 16 April 2010. The precise scope of the arbitration agreement in Annex 1 to the Protocol extended to '[d]isputes between an investor and a State Party concerning an obligation of the [State] in relation to an admitted investment … after exhausting local remedies'. *See ibid*.
18. *Swissbourgh*, paras 35, 37.
19. *Ibid*., paras 44–45.

remedies.[20] The Singapore Court of Appeal affirmed the decision of the High Court to set aside the award, holding that the right to refer claims to the SADC tribunal was not a protected investment, as it failed the requirement of territoriality[21] and that in any event, the investors were held to have failed to exhaust local remedies.[22]

From these two decisions, a number of principles emerge illuminating the Singapore courts' approach to investment instruments and the exercise of its curial functions vis-à-vis investment arbitrations. First, the jurisdiction of an investment arbitration tribunal will be reviewed de novo.[23] Second, the Singapore courts are willing and able to engage in the exercise of treaty interpretation with reference to the VCLT and principles of international law.[24] Third, the Singapore courts would have regard to the writings of authoritative bodies on international law such as the ILC.[25] Fourth, the Singapore courts are willing to deal with and take into consideration the decisions of international tribunals on issues of international law.[26] In sum, the Singapore courts have shown they are more than willing to grapple with complex issues of international law in discharging their duties as supervisory courts of an investment arbitration.

[2] Applying the Singapore Approach to Achmea*-Style Situations*

With an understanding of the Singapore courts' approach to its curial role in investment arbitrations, this section discusses how the Singapore courts would have dealt with a situation like that in *Achmea*, where a dispute resolution mechanism in a BIT precedes the accession of both State parties to that BIT to a multilateral treaty like the TFEU and TEU.

It should be noted that the CJEU's decision critically did not engage in questions of treaty interpretation. Instead, the CJEU's decision turned on the question of compatibility of arbitration clause in the BIT with EU law. However, it ought to be recalled that when the jurisdictional objections were raised before the Tribunal, the issue was characterised *inter alia* in terms of the VCLT. In particular, Slovak Republic contended that the Tribunal had no jurisdiction to decide this case because the arbitration clause in the BIT is not 'compatible' with the EC Treaty within the meaning

20. *Ibid.*, para. 57.
21. *Ibid.*, paras 112–113, 138–139, 163.
22. *Ibid.*, paras 219–224.
23. *Sanum*, paras 40–44.
24. The Singapore Court of Appeal affirmed the approach to treaty interpretation enshrined in Articles 31 and 32 of the VCLT in *Sanum*, para. 46 and *Swissbourgh*, para. 60.
25. *See Swissbourgh*, paras 210–211, where the Singapore Court of Appeal considered the work of the ILC on diplomatic protection.
26. *See*, for instance, *Sanum*, paras 131, 135, 146 and *Swissbourgh*, paras 61–62, 105–107, 122–123 where the Singapore Court of Appeal made extensive reference to and analysed a host of ICSID cases; Sanum, para. 112 and *Swissbourgh*, paras 206 and 215 where the Singapore Court of Appeal made reference to decisions of the PCIJ and its successor, the International Court of Justice; and *Swissbourgh*, para. 159 where a decision of the South African Development Community Tribunal was considered.

of Article 30 of the VCLT. In all likelihood, the Singapore courts would have resorted to the provisions of the VCLT as a first port of call when deciding this issue.

Article 30 of the VCLT provides:[27]

> 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 latter treaty*.
> 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.
> 5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty.

The effect of Article 30 of the VCLT is that without express indication as to treaty succession, the earlier treaty will continue to apply only insofar as it is not incompatible with the later treaty.

Without doubt, the Netherlands and Slovakia were both parties to the Netherlands-Slovakia BIT prior to both becoming Member States of the EU. However, the answer as to whether the Netherlands-Slovakia BIT and the TFEU (along with the TEU) are 'treaties relating to the same subject-matter' is less clear.

While Slovakia took pains before the Tribunal to emphasise numerous substantive rights under the Netherlands-Slovakia BIT overlapping with provisions of the TEU,[28] a leading treatise on treaty interpretation has reiterated the prevailing view that '…[i]f a general treaty, however, "impinged indirectly on the content of a particular provision of an earlier treaty", Art 30 should not be applicable'.[29] Arguably, while certain substantive rights ensured under the TEU and TFEU do address the substantive rights under the Netherlands-Slovakia BIT, the former are clearly of general application, while the latter only ensure substantive protection to 'an investor of the other Contracting Party',[30] and the overlap seems to be coincidental, rather than deliberate.

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27. Emphasis added.
28. *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13 (formerly *Eureko B.V. v. The Slovak Republic*), Award on Jurisdiction, 26 October 2010, para. 247.
29. Oliver Dorr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*, 510 (Springer, 2012).
30. The Netherlands-Slovakia BIT, Articles 3, 5, 8.

Even assuming that the treaties in question relate to the same subject matter, it is hard to see how they would be incompatible. Incompatibility under Article 30 of the VCLT is where 'obligations cannot be complied with simultaneously, i.e. if […] States Parties to both treaties cannot comply with one of them without breaching the other'.[31] When referring the questions to the CJEU, the German Court noted that the EU judicature simply did not provide for a mechanism for aggrieved investors such as Achmea to bring claims before the EU judicature, for compensation from a Member State under a BIT such as the Netherlands-Slovakia BIT, a point the CJEU did not appear to disagree with.[32] In the premises, it can hardly be said that an aggrieved intra-EU investor's invocation of the dispute resolution mechanism in an intra-EU BIT would amount to a breach of the TEU and TFEU, or is otherwise incompatible with these instruments.

It is argued that compliance with Article 8 of the Netherlands-Slovakia BIT does not impinge on compliance with the judicial mechanisms envisioned under the TFEU. This is especially given that as far as possible, and if interpretation can cure an apparent conflict, a harmonious reading of successive treaties is preferred to one which would produce conflict.[33] Nothing would prohibit a Singapore court from holding that Article 8 of the Netherlands-Slovakia BIT can operate notwithstanding the mechanisms envisioned under the TFEU.

An additional principle that the Singapore courts would likely have regard to when faced with an *Achmea*-style situation would be that of *lex specialis*. The principle of *lex specialis*, as explained by the ILC in the Report of its Study Group on Fragmentation of International Law,[34] states that 'if a matter is being regulated by a general standard as well as a more specific rule, then the latter should take precedence over the former'.[35]

The principle of *lex specialis* finds wide endorsement in international law jurisprudence[36] and is expressly referred to in Article 55 of the ILC's Draft Articles on the Responsibility of States for Internationally Wrongful Acts.[37] In the context of resolving conflicts between treaties, '… [a]lthough the principle did not find its way into the text of the VCLT, it was still observed during its drafting process that among the

31. Dorr and Schmalenbach, *supra* n. 29, at 511.
32. *Achmea*, para. 17.
33. *Ibid*.
34. United Nations General Assembly, *Fragmentation of International Law; Difficulties Arising from the Diversification and Expansion of International Law (Report of the Study Group of the International Law Commission)* (2006) UN Doc A/CN.4/L.682 (ILC Report on Fragmentation).
35. *Ibid*., para. 6.
36. *Ibid*., paras 56–61.
37. ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001), Supplement No. 10 (A/56/10). Article 55 provides that:

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

techniques of resolving conflicts between treaties it was useful to pay attention to the extent to which a treaty might be "special" in relation to another treaty'.[38]

The principle has been readily applied in situations where a general treaty precedes a specialised treaty,[39] but it is argued that there is no compelling reason in principle for why the *lex specialis* principle should disapply in situations where the specialised rule comes from an earlier treaty. Indeed, any presumption of a later treaty overriding the intention contained in an earlier treaty 'will not abrogate a prior treaty obligation if the speciality of that prior obligation may be taken as indication that the parties did not envisage this outcome'.[40] Seen in this light, Article 8 of the Netherlands-Slovakia BIT may be rationalised as *lex specialis*; it is to apply to the specific situation where investors of one State bring a claim under the terms of a BIT against the other State, and a deviation from the general rule envisioned under the TFEU.

It would be speculative to assume as a matter of certainty that the above arguments would be accepted by the Singapore courts. The point remains, however, that these were arguments not dealt with by the CJEU in its decision. It is suggested that the issues decided on by the CJEU only represent half the story that a supervisory court would have to grapple with when deciding issues engaged in *Achmea*.

[B] *Achmea* and Public Policy as a Means of Challenging or Refusing Enforcement of an Award

The second question is this: does the decision in *Achmea*, as it stands, present a compelling reason for the Singapore courts to set aside arbitral awards or refuse their enforcement on the ground of public policy?

It is, of course, crucial to first understand how the public policy ground features in Singapore arbitration legislation. Public policy is both a ground for setting aside awards under the UNCITRAL Model Law (which has the force of law in Singapore pursuant to Section 3(1) of the IAA)[41] and a ground for the refusal of enforcement of a foreign arbitral award under the IAA. In the setting aside context, Article 34(2)(b)(ii) of the UNCITRAL Model Law provides that an arbitral award may be set aside by the court of the seat of arbitration if the court finds that 'the award is in conflict with the public policy of [that] State'. As for refusal of enforcement, Section 31(4)(b) of the IAA states that 'the court may refuse to enforce [a foreign] award if it finds that […] enforcement of the award would be contrary to the public policy of Singapore'. The Singapore Court of Appeal has confirmed that the same test is applied in respect of the public policy ground, whether in the context of setting aside or refusal of enforcement.[42]

Singapore courts have interpreted the public policy ground under Article 34(2)(b)(ii) of the UNCITRAL Model Law narrowly, and a high threshold must be

38. ILC Report on Fragmentation, *supra* n. 34, at [para. 65].
39. *See*, for instance, *Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, PCIJ Series A, No. 2 (1924).
40. ILC Report on Fragmentation, *supra* n. 34, para. 114.
41. Section 3(1) of the IAA states: 'Subject to this Act, the Model Law, with the exception of Chapter VIII thereof, shall have the force of law in Singapore.'
42. *AJU v. AJT* [2011] 4 SLR 739 (*AJU v. AJT*) paras 37–38.

overcome by the applicant seeking to rely on this ground. A passage in the Court of Appeal's judgment in *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*[43] is particularly helpful in understanding Singapore's view of public policy:[44]

> Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would 'shock the conscience' (see Downer Connect ([58] *supra*) at [136]), or is 'clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public' (see Deutsche Schachbau v. Shell International Petroleum Co Ltd [1987] 2 Lloyds' Rep 246 at 254, per Sir John Donaldson MR), or where it violates the forum's most basic notion of morality and justice: see Parsons & Whittemore Overseas Co Inc v. Societe Generale de L'Industrie du Papier (RAKTA) 508 F 2d 969 (2nd Cir, 1974) at 974. This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law.

Would a public policy challenge to an intra-EU investment arbitral award or its enforcement succeed in light of the CJEU's decision in *Achmea*? A hopeful applicant of a setting aside or refusal of enforcement action to rely on *Achmea* in a compelling way may perhaps suggest to the Singapore courts that (i) the non-interference with or enforcement of an arbitral award so clearly regarded as illegal in EU law by the chief judicial body in the EU would be 'injurious to the public good' since it would, among other things, possibly be detrimental to Singapore's foreign relations with the EU or (ii) the underlying arbitration agreement is illegal as a matter of EU law.

The first contention can be easily dealt with by reference to the Singapore Court of Appeal's decision in *PT Asuransi v. Dexia Bank* in which it affirmed the principle that public policy 'was not equivalent to the political stance or international policies of a State but comprised the fundamental notions and principles of justice'.[45] A noted commentator has also observed that consideration of public policy of a foreign State 'is appropriate only in exceptional cases' among UNCITRAL Model Law countries.[46] It does not, therefore, appear likely that having regard to *Achmea* solely for the interests of Singapore foreign policy would be sufficient for a successful challenge on the public policy ground.

As to the second contention, some guidance may be had from the Singapore Court of Appeal's decision in *AJU v. AJT*.

In this case, the Court of Appeal dealt with an appeal from a decision of the High Court to set aside an interim award obtained under the auspices of the Singapore International Arbitration Centre (SIAC).[47] The award in question was made in relation

43. [2007] 1 SLR(R) 597 (*PT Asuransi v. Dexia Bank*).
44. *Ibid.*, para. 59.
45. *Ibid.*, para. 59; United Nations General Assembly, *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session* (1985) UN Doc A/40/17, para. 296.
46. Gary Born, *International Commercial Arbitration*, 3317 (2nd ed., Kluwer Law International, 2014).
47. *AJU v. AJT*, para. 1.

to a dispute over the validity of an agreement (Concluding Agreement) under which the respondent in the appeal (and claimant in the arbitration) was to terminate the arbitration proceedings it had commenced.[48] This was, under the Concluding Agreement, conditional on the appellant effecting the 'withdrawal and/or discontinuation and/or termination of all' criminal proceedings which had been commenced in Thailand on the complaint of the appellant over allegations of fraud, joint forgery and use of a forged document perpetrated by the respondent's sole shareholder and director, along with two companies associated with the respondent.[49] Critically, while fraud is a compoundable offence under Thai law, forgery and use of a forged document are non-compoundable offences.[50] The appellant duly withdrew its complaints after the Concluding Agreement was signed, and the Thai prosecution authority wrote to the appellant confirming it would issue 'a cessation order not to prosecute' the charges relating to fraud and 'a non-prosecution opinion not to prosecute' on the charges relating to forgery and use of a forged document.[51] The Thai prosecution authority subsequently sent the appellant a 'formal non-prosecution order' in respect of the charges relating to forgery and use of a forged document, stating the reason to be insufficiency of evidence.[52] The respondent's sole shareholder and director took the view that the non-prosecution order was insufficient in light of the appellant's obligation to bring an end to the Thai criminal proceedings and that there was a possibility of a reopening of investigations upon the appellant (or any other party) furnishing evidence.[53] After the appellant made an application to terminate the arbitration in light of the Concluding Agreement, the respondent challenged the validity of the Concluding Agreement on 'grounds of duress, undue influence and illegality'.[54] The parties agreed to refer the question of the validity of the Concluding Agreement to the tribunal, *inter alia*, that the Concluding Agreement was not illegal.[55] On its findings on illegality, the tribunal noted that both parties had been aware of the forgery-related charges being non-compoundable when signing the Concluding Agreement.[56]

The respondent in the appeal succeeded at first instance before the Singapore High Court to set aside the interim award on the basis that the Concluding Agreement was illegal and unenforceable in Thailand for essentially being an agreement to 'stifle the prosecution in Thailand of forgery and use of a forged document'.[57] The issues before the Court of Appeal were whether the High Court judge was 'correct in going behind the interim award and reopening the Tribunal's finding that the Concluding

48. *Ibid.*, para. 2.
49. *Ibid.*, paras 6–7.
50. *Ibid.*, para. 6.
51. *Ibid.*, para. 8.
52. *Ibid.*, para. 10.
53. *Ibid.*, para. 12.
54. *Ibid.*, para. 13.
55. *Ibid.*, paras 13–14.
56. *Ibid.*, para. 15.
57. *Ibid.*, paras 17, 24.

Agreement was valid and enforceable' and whether the judge was correct in finding the Concluding Agreement was illegal.[58]

The Court of Appeal allowed the appeal on the first ground, holding that the High Court judge 'erred in reopening the Tribunal's finding of fact that the Concluding Agreement "[did] not suggest whatsoever that the … [a]greement was for an illegal purpose or that some illegal acts would be performed by the [Appellant]" and, for that reason, was not an illegal contract under either Singapore law or Thai law'.[59] In arriving at this decision, the Court of Appeal declined to follow the approach laid down by the English Court of Appeal in *Soleimany v. Soleimany*,[60] which permitted a 'more liberal (and "interventionist") approach'[61] to reopening findings of a tribunal with regard to illegality of an underlying agreement. Instead, it relied on the majority opinion in another English Court of Appeal decision, *Westacre Investments Inc v. Jugoimport-SPDR Holding Co Ltd*,[62] which placed emphasis on 'the continued unhindered operation of the New York Convention as an overriding policy in matters concerning international arbitration'[63] and which the Singapore Court of Appeal viewed to be 'consonant with the legislative policy of the IAA'.[64] The Singapore Court of Appeal, in applying this more restrictive approach, held that the dispute before it was 'not an appropriate case […] to reopen the Tribunal's finding that the Concluding Agreement was valid and enforceable because the tribunal there did not ignore palpable and indisputable illegality'.[65] In particular, the court held:

> In our view, the Judge was not entitled to reject the Tribunal's findings and substitute his own findings for them. On the facts of this case, s 19B(1) of the IAA[66] calls for the court to give deference to the factual findings of the Tribunal. The policy of the IAA is to treat IAA awards in the same way as it treats foreign arbitral awards where public policy objections to arbitral awards are concerned, even though, in the case of IAA awards, the seat of the arbitration is Singapore and the governing law of the arbitration is Singapore law. Arbitration under the IAA is international arbitration, and not domestic arbitration. That is why s 19B(1) provides that an IAA award is final and binding on the parties, subject only to narrow grounds for curial intervention. This means that findings of fact made in an IAA award are binding on the parties and cannot be reopened except where there is fraud, breach of natural justice or some other recognised vitiating factor.

58. *Ibid.*, para. 26.
59. *Ibid.*, para. 75.
60. [1998] QB 785.
61. *AJU v. AJT*, para. 58.
62. [2000] 1 QB 288.
63. *AJU v. AJT*, para. 59.
64. *Ibid.*, para. 60.
65. *Ibid.*, para. 64.
66. Section 19B(1) of the IAA states:

> An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.

Of note is that the Court of Appeal characterised the tribunal's findings on the intention of parties in signing the Concluding Agreement (which had led it to the conclusion on the validity of the Concluding Agreement) as 'findings of fact which are not correctable as they are final and binding on both parties'.[67] The public policy ground was thus 'not engaged by such findings of fact'.[68] By contrast, the Court emphasised that a decision on 'what the public policy of Singapore is' and the illegality of agreements in light of that policy are liable to being reopened and cannot be abrogated to a tribunal.[69]

In a situation where the tribunal arrives at a finding that the agreement to arbitrate within the intra-EU BIT is legal and valid notwithstanding *Achmea*, the Singapore Courts, following the approach in *AJU v. AJT*, are likely to respect a tribunal's finding on legality or absence of illegality and may be slow to overturn a tribunal's finding. That being said, if the finding of a tribunal is perceived not as a finding of fact but a question of law as to whether an arbitral award rendered pursuant to an intra-EU BIT would constitute 'palpable and indisputable illegality', the Singapore Courts may then be more prepared to intervene. It will certainly be interesting to see how Singapore Courts grapple with the issue of respecting the clear and settled positions on illegality expressed by the CJEU in *Achmea* and the recent termination of intra-EU BITs by 23 EU Member States to implement *Achmea*[70] through the public policy lens in future decisions to come.

[C] *ASEAN Integration and Lessons from* Achmea

Yet another perspective Singapore can provide following *Achmea* is as a member of ASEAN. While ASEAN and the EU are both highly successful regional organisations in their own right, they are fundamentally different. The EU is premised on a much higher degree of integration through supranationalism (not least evinced by the TEU and TFEU, discussed above), while ASEAN is built on what has been described as 'soft regionalism'[71] and integration through an 'intergovernmental approach'.[72] Nevertheless, as will be detailed below, ongoing efforts to harmonise commercial laws among ASEAN Member States remain.

This raises the third question that will be addressed in this Chapter, to which *Achmea* becomes relevant: should ASEAN, as a regional bloc, follow in the footsteps of the EU or guard against a situation like the one generated after *Achmea*?

67. *AJU v. AJT*, para. 70.
68. *Ibid*.
69. *Ibid*., para. 62.
70. https://ec.europa.eu/info/files/200505-bilateral-investment-treaties-agreement, last visited 5 May 2020.
71. Maneesha Tripathi, *European Union and ASEAN: A Comparison*, 2(1) International Journal of Research 376, 378 (2015).
72. *Ibid*.

In 2009, the ASEAN Integration Through Law Project was established with the mandate of carrying out comparative studies of the laws of ASEAN Member States.[73] The Project represents one of many efforts whose aim was described by Singapore's Chief Justice Sundaresh Menon as 'legal convergence'.[74] In particular, the Honourable Chief Justice noted in the same speech that:[75]

> Legal uncertainty created by the heterogeneity of laws has been cited as one of the biggest obstacles to trade and investment in Asia. This uncertainty generates significant transactional costs and acts as a fetter on investment, consumption and growth. This is why efforts to promote legal convergence are so worthwhile and significant, and all those who have an interest in ASEAN economic integration in particular, must remain vitally engaged in the endeavour.

In 2015, the ASEAN Economic Community (AEC) was established to aid regional economic integration among ASEAN countries.[76] Underlying the AEC's path forward is the AEC Blueprint 2025, which recognises 'that regional economic integration is a dynamic, ongoing process'.[77] Among the measures envisioned under the AEC Blueprint 2025 are 'a deeply integrated and highly cohesive ASEAN economy' and promotion of the 'use of the ASEAN Protocol on Enhanced Dispute Settlement Mechanism'.[78] ASEAN Member States are also parties to the ASEAN Comprehensive Investment Agreement, which has investor-state dispute resolution mechanisms where arbitration is available to an investor.[79] It cannot be doubted that the push for regional integration in ASEAN has and will continue to grow at a rapid pace. In this context, *Achmea* is all the more relevant.

Drafters of any future agreement on the establishment of a regional system of courts within ASEAN (like the EU judicature) would have to deal with whether the approach taken by the CJEU is desirable. If ASEAN Member States would prefer avoiding the rigid compliance with regional court processes in favour of more liberal private settlement of investment disputes, they should endeavour to make this clear in the instrument underlying this court system (whatever form it takes). One means of doing so would be to rely on the mechanism under Article 30(2) of the VCLT which, as noted above, provides that: '[w]hen a treaty specifies that it is subject to, or that it is not

73. National University of Singapore Centre for International Law, *Integration through Law: The ASEAN Way in a Comparative Context*, Mission Statement, available at https://cil.nus.edu.sg/wp-content/uploads/2016/08/2.2-Project-Design_Mission-Statement.pdf, last visited 13 August 2019.
74. Chief Justice Sundaresh Menon, *Welcome Address by Chief Justice Sundaresh Menon, Opening Ceremony of the 13th ASEAN Law Association General Assembly*, available at https://www.aseanlawassociation.org/13GAdocs/cjmenonspeech1.pdf, last visited 13 August 2019.
75. *Ibid*.
76. ASEAN, *ASEAN Economic Community*, available at https://asean.org/asean-economic-community/, last visited 13 August 2019.
77. ASEAN, *ASEAN Economic Community Blueprint 2025*, available at https://asean.org/?static_post=asean-economic-community-blueprint-2025, last visited 13 August 2019. The full Blueprint is available at https://www.asean.org/storage/2016/03/AECBP_2025r_FINAL.pdf, last visited 13 August 2019.
78. *Ibid*.
79. http://agreement.asean.org/media/download/20140119035519.pdf, last visited 13 August 2019, see section B.

to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail'. Making clear that this hypothetical court system is 'subject to' earlier and future investment dispute settlement agreements between any number of ASEAN Member States would make it clear that no incompatibility would exist between the hypothetical regional court system and the dispute resolution processes envisioned in individual BITs.

However, if ASEAN Member States view the outcome in *Achmea* as desirable, they should endeavour to create certainty through clarity in drafting. It is suggested that one way to make clear the intention of parties to defer to the regional court system would be to oblige ASEAN Member States to amend or supplement dispute resolution clauses in BITs or multilateral treaties (like the ASEAN Comprehensive Investment Agreement) which may be incompatible with the decisions of the regional court system.

Given that ASEAN's attempts to achieve greater commercial and legal integration are still nascent, it may perhaps be premature to consider, if ASEAN will be likely to follow the CJEU's perspective in the *Achmea*. The answer to this will mostly depend on the degree of harmonisation of commercial law among ASEAN Member States as well as the scope of the powers delegated to any supranational ASEAN judicial body. The higher the degree of harmonisation and the greater the powers delegated, the more likely ASEAN is to follow *Achmea*. However, given the diversity of the political, economic and legal orders between ASEAN Member States and the widely differing developmental stages that the ASEAN Member States are at, it is not likely that ASEAN will achieve the same level of economic and legal integration like the EU in the foreseeable future.

On the other hand, it may also be precisely because efforts in ASEAN on integration are at such an early stage, that it is perhaps appropriate for ASEAN Member States to consider the questions raised by *Achmea*. It will certainly be interesting to see the course that ASEAN law takes in the future.

§11.03 THE FUTURE OF EU-SINGAPORE INVESTMENT ARBITRATION AND THE EU's NEW APPROACH TO ISDS

This section provides an overview of key provisions of EU-Singapore investment agreements and the ISDS mechanisms envisioned therein. It then provides reflections on the compatibility of these mechanisms with EU law in light of *Achmea*.

[A] The EU-Singapore Agreements

In October 2018, the EU and Singapore signed the Investment Protection Agreement[80] (EU-SIPA) and a Free Trade Agreement (EU-SFTA). These are the 'first bilateral trade and investment agreements concluded between the EU and a Member State of the

80. Investment Protection Agreement between the European Union and its Member States and the Republic of Singapore (2018).

ASEAN'.[81] The EU-SIPA replaces twelve BITs[82] between Singapore and EU Member States (including the ones with Belgium-Luxembourg Economic Union, Bulgaria, the Czech Republic, France, Germany, Hungary, Latvia, the Netherlands, Poland, Slovakia, Slovenia and the UK) and 'establishes a modern common investment protection framework for all EU investors in Singapore'.[83] The European Parliament has given its consent to the EU-SIPA and the EU-SFTA in February 2019.[84] The EU-SIPA will come into force once it is ratified by all the EU Member States, in accordance with their respective national ratification procedures.[85]

An analysis of the provisions of the EU-SIPA shows that the EU has tried to address most of the major concerns raised against investor-treaty arbitration. The detailed, prescriptive substantive provisions in the EU-SIPA provide more clarity and certainty on the standards applicable to substantive obligations. The EU-SIPA also has prescribed timelines which seek to promote efficiency. The ICS and the proposed MIC are EU's responses to the multiple criticisms levelled against the current investor-State arbitration regime. Whether the EU's new approach will effectively address all concerns raised by the critiques of ISDS remains to be seen. However, once the EU-SIPA enters into force, the ISDS mechanism in the respective BITs would be replaced with the ICS, which could signal a gradual acceptance towards the MIC being advocated by the EU.

[1] The EU-SIPA

According to the European Commission, the EU-SIPA 'contains all aspects of the EU's new approach to investment protection and its enforcement mechanisms that are not present in the existing bilateral investment treaties between Singapore and EU Member States'.[86]

The objective of the EU-SIPA is 'to enhance the investment climate between the member nations of the EU and Singapore'.[87] The definition of 'covered investment' specifically includes investments owned 'directly or indirectly' or 'controlled directly or indirectly'.[88] This explicit reference to 'indirect investments' is noteworthy as many investment cases hinge upon the question of whether the Treaty in question covers indirect investments when the language of the Treaty does not mention so.

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81. *Key elements of the EU-Singapore trade and investment agreements*, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1827, last visited 13 August 2019.
82. With reference to the BITs, it has been stated that '(m)ost of these are old-style agreements that do not incorporate the EU's reformed approach to investment protection and dispute resolution'. The EU-Singapore agreements explained available at http://ec.europa.eu/trade/policy/in-focus/eu-singapore-agreement/agreement-explained/, last visited 13 August 2019.
83. *The EU-Singapore agreements explained*, available at http://ec.europa.eu/trade/policy/in-focus/eu-singapore-agreement/agreement-explained/, last visited 13 August 2019.
84. *Countries and Regions – Singapore*, available at http://ec.europa.eu/trade/policy/countries-and-regions/countries/singapore/, last visited 13 August 2019.
85. *Key elements of the EU-Singapore trade and investment agreements, supra* n. 81.
86. *Ibid*.
87. Article 1.1, EU-SIPA.
88. Article 1.2(1), EU-SIPA.

The substantive protections in the EU-SIPA include national treatment,[89] fair and equitable treatment (FET),[90] and expropriation.[91]

[2] FET

The FET provision has been set out in detail. A State breaches the obligation of FET if its measure or series of measures constitute:

(i) a denial of justice in criminal, civil and administrative proceedings;[92]
(ii) a fundamental breach of due process;
(iii) manifestly arbitrary conduct;
(iv) harassment, coercion, abuse of power or similar bad faith conduct.[93]

In determining whether the FET obligation has been breached, a tribunal may take into account 'whether a Party made specific or unambiguous representations to an investor so as to induce the investment, that created legitimate expectations of a covered investor and which were reasonably relied upon by the covered investor, but that the Party subsequently frustrated'.[94]

Any State that has given a specific and clearly spelt out commitment in a contractual written obligation towards a covered investor with respect to its covered investment shall not frustrate or undermine the said commitment through the exercise of its governmental authority either deliberately or 'in a way in which substantially alters the balance of rights and obligation'.[95]

Given that the FET obligation is one of the most contested and diversely interpreted provisions in investor-treaty claims, the EU-SIPA has tried to provide the necessary clarity by explicitly including the examples of which constitute a breach of FET. It is noteworthy that both 'denial of justice' and the doctrine of 'legitimate expectation' have been explicitly spelt out. Such express inclusions provide more certainty to the interpretation of the FET obligation.

[3] Expropriation

The provision on expropriation[96] is broadly worded (like in many other BITSs), to cover both direct and indirect measures.[97] A noteworthy feature in the EU-SIPA is the detailed provision dealing with compensation for expropriation. In terms of Article

89. Article 2.3, EU-SIPA.
90. Article 2.4, EU-SIPA.
91. Article 2.6, EU-SIPA.
92. *See* the footnote in Article 2.4(2)(a), EU-SIPA, which states: 'For greater certainty, the sole fact that the covered investor's claim has been rejected, dismissed or unsuccessful does not in itself constitute a denial of justice.'
93. Article 2.4(2), EU-SIPA.
94. *Ibid*., Article 2.4(3).
95. *Ibid*., Article 2.4(6)(b).
96. Article 2.6 read with Annexes 1 to 3, EU-SIPA.
97. Article 2.6(1) states:

2.6(2), 'compensation shall amount to the FMV of the covered investment immediately before its expropriation or impending expropriation became public knowledge plus interest at a commercially reasonable rate, established on a market basis taking into account the length of time from the time of expropriation until the time of payment'. The aforementioned article mandates the calculation of compensation according to the FMV of the covered investment. Considering that the date of valuation makes a huge difference to the determination and quantum of compensation, it is pertinent to note that Article 2.6(2) also provides guidance on the date at which the FMV should be calculated. The compensation has to be effectively realisable, freely transferable and made without delay.[98] While most BITs are silent on the valuation criteria to be applied and leave it to the discretion of a tribunal, the EU-SIPA mentions that the valuation criteria used to determine FMV 'may include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate'.[99] However, this is not mandatory and the tribunal is given a discretion to adopt any valuation criteria, including the ones listed in Article 2.6(2).

A perusal of the EU-SIPA indicates that the substantive obligations have been set out in detail when compared to earlier BITs. This could provide more certainty in interpretation by tribunals. This also addresses one of the often-cited criticisms of ISDS that there is a lack of uniformity in the interpretation of various substantive obligations.

[B] ISDS under the EU-SIPA

One of the unique features of the EU-SIPA is its ISDS mechanism. A permanent Investment Court System (ICS) consisting of a Tribunal of First Instance and an Appeal Tribunal is provided for in the Dispute Settlement Chapter (Chapter 3). Similar ISDS provisions may be found in the trade agreements the EU has with Canada[100] and Vietnam.[101] ISDS under the EU-SIPA is a marked departure from most BITs, which generally provide for investor-State arbitration by ad hoc tribunals with party-appointed arbitrators.

> 1. Neither Party shall directly or indirectly nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as 'expropriation') the covered investments of covered investors of the other Party except:
>
> (a) for a public purpose;
> (b) in accordance with due process of law;
> (c) on a non-discriminatory basis; and
> (d) against payment of prompt, adequate and effective compensation in accordance with paragraph 2.

98. Article 2.6(2), EU-SIPA.
99. *Ibid*., Article 2.6(2).
100. CETA, available at http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/, last visited 13 August 2019.
101. Free Trade Agreement between the European Union and the Socialist Republic of Vietnam available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1437, last visited 13 August 2019.

The two-tiered permanent 'Court-like system ensures that investment protection rules are adhered to and strikes a balance between protecting investors in a transparent manner and safeguarding a State's right to regulate to pursue public policy objectives.'[102] There are in-built timelines stipulated for bringing a claim and rendering decisions. Strict adherence to such timelines would help in addressing one of the heavily criticised aspects of investor-treaty arbitration that the proceedings can be very lengthy and time-consuming.

[1] ICS: Two-Tier Court System

The EU-SIPA provides for a permanent investment court – a two-tier tribunal consisting of the Tribunal of First Instance[103] and an Appeal Tribunal.[104] This appellate mechanism is innovative, compared to the traditional investment arbitral tribunal. Under this ICS system, the awards issued by the Tribunal of First Instance are referred to as 'provisional awards', and the Appeal Tribunal is established to hear appeals from such provisional awards.[105] It has been touted that the introduction of an appellate body into the investment arbitration ecosystem will help to resolve issues associated with traditional investment arbitration such as inconsistency of decisions, lack of predictability of the law, and the general absence of coherence within the field.[106]
The Tribunal of First Instance consists of six members (two each nominated by the EU and Singapore, and two members, who are not the nationals of either the EU or Singapore, to be jointly nominated by the EU and Singapore) appointed for an eight-year term. The EU-SIPA also provides for a permanent Appeal Tribunal with six members appointed for an eight-year term and in the same way as the Tribunal members are appointed.[107]

The qualifications prescribed are the same for members of the Tribunal of First Instance and the Appeal Tribunal. The qualifications which are mandatory are (i) to possess qualifications required of judges in their respective countries or to be jurists of recognised competence and (ii) specialised knowledge of, or experience in, public international law.[108] Other 'desirable' qualifications are expertise in international investment law, international trade law or the resolution of disputes arising under international investment or international trade agreements. It may be observed that while knowledge of public international law is a mandatory qualification, expertise in international investment law has been mentioned as a 'desirable' qualification. The President and Vice President (who are drawn by lot from the members and appointed

102. *European Union – Singapore Trade and Investment Agreements* available at http://trade.ec.europa.eu/doclib/docs/2019/february/tradoc_157684.pdf, last visited 13 August 2019.
103. Article 3.9, EU-SIPA.
104. *Ibid.*, Article 3.10.
105. *Ibid.*, Article 3.10(1).
106. Nicolette Butler, *Possible Improvements to the Framework of International Investment Arbitration*, 14 The Journal of World Investment & Trade 613, 631 (2013).
107. Articles 3.9(5) and 3.10(5), EU-SIPA.
108. Articles 3.9(4) and 3.10(4), EU-SIPA.

for a four-year term) in the Tribunal of First Instance and the Appeal Tribunal are responsible for organisational issues.[109]

[2] Independence of the Tribunal

A noteworthy feature of the EU-SIPA is the incorporation of detailed provisions on ethics.[110]

The EU-SIPA mandates that the members of the Tribunal and the Appeal Tribunal have to be chosen from 'amongst persons whose *independence is beyond doubt*'. It is further required that 'they shall not be affiliated with any government, and in particular, shall not take instructions from any government or organisation with regard to matters related to the dispute' and 'shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest'.[111] It is mandatory for the members of the Tribunal, Appeal Tribunal and mediators to comply with Annex 7 (Code of Conduct for Members of the Tribunal, the Appeal Tribunal and Mediators). They are also required upon appointment 'to refrain from acting as counsel, party-appointed expert or party-appointed witness in any pending or new investment protection dispute under this or any other agreement or domestic law'. However, the EU-SIPA does not clearly address the question of whether such restriction will apply to the appointee's entire firm or only the appointee himself. It remains to be seen how the Tribunal will handle such a situation in practice in the future.

[3] Composition of the Tribunal

Each case shall be heard by a tribunal consisting of three members – one member each from the EU, Singapore nominees and one joint nominee who shall be the Chair.[112] Party-appointed arbitrators have been completely done away with. Although the States still have a role to play in the appointment of the members of the two-tier court, the members of the court will be permanently appointed instead of being selected on a case-to-case basis (as in investor-treaty arbitration). While critiques of investor-treaty arbitration argue against party-appointed arbitrators and question their 'impartiality', party-appointments and party autonomy are the hallmark features of arbitration, and one of the main attractions of arbitration, and some may argue that party autonomy is curtailed to some extent in the EU's new approach to ISDS with the ICS.

The disputing parties may also agree that a case (in the Tribunal of First Instance) be heard by a sole member.[113] This member shall be selected by the President of the Tribunal from among those members who had been appointed jointly by the EU and Singapore. It has further been stated that '(t)he respondent shall give sympathetic consideration to such a request from the claimant, in particular where the claimant is

109. *Ibid.*, Articles 3.9(6) and 3.10(6).
110. *Ibid.*, Article 3.11.
111. *Ibid.*, Article 3.11(1).
112. *Ibid.*, Articles 3.9(7) and 3.10 (7).
113. *Ibid.*, Article 3.9(9).

a small or medium-sized enterprise or the compensation or damages claimed are relatively low. Such a request should be made at the same time as the filing of the claim'.[114] The Tribunal and the Appeal Tribunal have the flexibility to draw up their own working procedures.[115]

[4] Award and Appeal

The EU-SIPA specifically deals with the kind of relief that a Tribunal *may* award, 'separately or in combination',[116] including monetary damages and any applicable interest, and restitution of property, provided that the respondent may pay monetary damages and any applicable interest in lieu of restitution, as determined by the Tribunal.

There is a further stipulation that monetary damages shall not be greater than the loss suffered, as a result of the breach of the provisions of Chapter 2 (Investment Protection), reduced by any prior damages/compensation already provided by the party concerned. It is also categorically mentioned that the 'Tribunal shall not award punitive damages.'[117] 'Where a claim is submitted on behalf of a locally established company, the award shall be made to the locally established company.'[118]

A provisional award is to be issued by the ICS Tribunal of First Instance within eighteen months of the date of submission of the claim and if no party appeals within ninety days of the issue of the provisional award, the award shall become final.[119] The grounds for appeal are (i) error in the interpretation or application of the applicable law; (ii) manifest error in the appreciation of facts, including the appreciation of relevant domestic law; and (iii) grounds provided in Article 52 of the ICSID Convention in so far as they are not covered by the other two grounds in the EU-SIPA.

Grounds in Article 52 of the ICSID Convention are that: the tribunal was not properly constituted; the tribunal manifestly exceeded its powers; corruption of a member of the tribunal; serious departure from a fundamental rule of procedure; and failure to state the reasons of the award.

The grounds for appeal under the EU-SIPA are quite wide, including errors in both interpretation of law and the appreciation of facts.

If the Appeal Tribunal dismisses the appeal, the award becomes final. The appeal may also be dismissed on an expedited basis where 'it is clear that the appeal is manifestly unfounded'.[120] If the appeal is 'well founded', the Appeal Tribunal 'shall modify or reverse the legal findings and conclusions in the provisional award in full or in part'[121] and 'shall refer the matter back to the Tribunal, specifying precisely how it

114. *Ibid.*, Article 3.9(9).
115. *Ibid.*, Articles 3.9(10) and 3.10 (9).
116. *Ibid.*, Article 3.18(1).
117. *Ibid.*, Article 3.18(2).
118. *Ibid.*, Article 3.18(3).
119. *Ibid.*, Article 3.18(4).
120. *Ibid.*, Article 3.19(2).
121. *Ibid.*, Article 3.19(3).

has modified or reversed the relevant findings and conclusions of the Tribunal'.[122] The Tribunal of First Instance is bound by the findings and conclusions of the Appeal Tribunal, and after hearing the disputing parties (if appropriate), shall revise its provisional award and issue the revised award within ninety days after the referral of the matter back to it. Although the EU-SIPA does not specify whether the revised award may be the subject of further appeal, it is unlikely that that is the intention of the drafters of the treaty, as otherwise, proceedings would turn into an endless loop, and would defeat the *raison d'être* of the ICS to achieve quick and efficient resolution of disputes between investors and host States.

An award is not enforceable until it has become final.[123] Final awards are not subject to 'appeal, review, set aside, annulment or any other remedy'[124] and each party *shall* recognise an award rendered pursuant to the EU-SIPA and enforce the pecuniary obligation within its territory as a final judgment of a court in that State.[125]

[C] Compatibility of the ICS with EU Law

In light of *Achmea*, the issue of compatibility of the EU-SIPA and the proposed ICS with EU law becomes more relevant. In 2015, the European Commission sought an Opinion from the CJEU under Article 218 (11) TFEU on the allocation of competences between the EU and its Member States in respect of the Free Trade Agreement (FTA) (which initially included the provisions relating to investment protection and ISDS) between the EU and Singapore. In its Opinion 2/15, the CJEU ruled that 'the European Union does not have exclusive competence to conclude an international agreement with the Republic of Singapore in so far as it relates to the protection of non-direct foreign investments'.[126] With reference to the ISDS regime, the CJEU opined that a regime which 'removes disputes from the jurisdiction of the courts of the Member States' 'cannot… be established without the Member States' consent'.[127] This resulted in the agreements being split into the EU-SFTA and the EU-SIPA, with the requirement that the EU-SIPA be ratified by each of the EU Member States in accordance with their national ratification procedures.

The CJEU had explicitly refrained from deciding on the question of whether the content of the (then) proposed FTA with Singapore was compatible with EU law.[128] In *Achmea*, the CJEU observed that:[129]

122. *Ibid.*, Article 3.19(3).
123. 'An award rendered pursuant to this section shall not be enforceable until it has become final pursuant to Articles 3.18(4) (Award), 3.19 (2) (Appeal Procedure), or 3.19 (3) (Appeal Procedure).' *See* Article 3.22(1), EU-SIPA.
124. *Ibid.*, Article 3.22(1).
125. *Ibid.*, Article 3.22(2).
126. Opinion 2/15 of the CJEU, 16 May 2017 (*Opinion 2/15*), para. 238.
127. *Ibid.*, para. 292.
128. *Ibid.*, para. 30:

> an international agreement providing for the establishment of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not in principle incompatible with EU law. The competence of the EU in the field of international relations and its capacity to conclude international agreements necessarily entail the power to submit to the decisions of a court which is created or designated by such agreements as regards the interpretation and application of their provisions, provided that the autonomy of the EU and its legal order is respected.

The ICS also forms a part of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, and the question of compatibility of the ICS with EU law had been referred by Belgium to the CJEU in Opinion 1/17.[130] In its decision dated 30 April 2019, the CJEU held that the CETA's ISDS mechanism, which provides for the ICS, is compatible with EU law. This decision of the CJEU has a huge implication on the EU-SIPA, for it has similar ISDS provisions as the CETA.

Similar to the EU-SIPA, the CETA provides for the establishment of a Tribunal and an Appeal Tribunal, as well as, in the longer term, an MIC. While the decision of the CJEU was pending, the Advocate General Bot, in his opinion dated 29 January 2019 (Bot's Opinion), had argued that the ICS was compatible with EU law. According to Bot's Opinion, through the reformed mechanism, the EU 'is supporting the initiative of a global reform of the model for settling disputes between investors and States through the development of the current ad hoc ISDS system, which is based on the principles of arbitration, into an ICS, the culmination of which would be the establishment of a permanent multilateral court'.[131] Bot's Opinion also made a reference to the criticisms of investment arbitration, which include, the lack of legitimacy and guarantees as to the independence of arbitrators, lack of consistency and foreseeability of awards, lack of review mechanisms to review an award and high costs of the proceedings.[132] He opined that the ISDS model chosen in the CETA struck the right 'balance between tradition and innovation in … investment arbitration'.[133]

In contrast with the CJEU's approach in *Achmea*, the CJEU followed Advocate General Bot's Opinion in its ruling on the CETA. At the outset, the CJEU observed that 'an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the (EU), is, in

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> (t)his opinion of the Court relates only to the nature of the competence of the European Union to sign and conclude the envisaged agreement. It is entirely without prejudice to the question whether the content of the agreement's provisions is compatible with EU law.

129. *Achmea*, para. 57.
130. Request for an opinion submitted by the Kingdom of Belgium pursuant to Article 218(11) TFEU (Opinion 1/17), available at http://curia.europa.eu/juris/document/document.jsf?text = &docid = 196185&pageindex = 0&doclang = en, last visited 4 May 2020.
131. Opinion of Advocate General Bot of 29January 2019, Opinion 1/17, available at http://curia.europa.eu/juris/document/document.jsf?text = &docid = 210244&doclang = EN, last visited 21 June 2020, para. 8.
132. *Ibid.*, para. 15.
133. *Ibid.*, para. 18.

principle, compatible with EU law'.[134] The following are some of the important observations made by the CJEU.

First, the ISDS mechanism under CETA does not fall within EU judicial system, and the courts established under CETA were separate from the domestic courts of Canada, EU and its Member States, so this mechanism did not adversely affect the autonomy of the EU legal order.[135] Second, EU law does not preclude 'either from providing for the creation of a Tribunal, an Appellate Tribunal and, subsequently, a multilateral investment Tribunal or from conferring on those Tribunals the jurisdiction to interpret and apply the provisions of the agreement having regard to the rules and principles of international law applicable between the parties'.[136] Third, since the Tribunals contemplated in CETA stood outside the EU judicial system, they cannot have the power to interpret or apply provisions of EU law other than those of the CETA or to make awards that might have the effect of preventing the EU institutions from operating in accordance with the EU constitutional framework.[137] Fourth, pursuant to Article 8.31.2 of the CETA, the Tribunal will not have jurisdiction over the legality of a measure alleged to constitute breach of the CETA under the domestic law of a party; it thus followed that the power of interpretation conferred on the Tribunal was confined to the provisions of the CETA, and such an interpretation had to be undertaken in accordance with the rules and principles of international law applicable between the parties.[138]

Fifth, when a Tribunal is requested to decide on the compliance of a measure by a host State with the CETA, the decision may require the examination of the host State's domestic law. However, in accordance with Article 8.31.2, such examination cannot involve interpretation of domestic law. Instead, such examination should be limited to taking into account domestic law as a matter of fact, and the Tribunal is obliged to follow the prevailing interpretation given to that domestic law by the courts or authorities of the host State.[139]

Finally, the CETA-ISDS mechanism would not adversely affect the exclusive jurisdiction of the CJEU over the definitive interpretation of EU law and would not affect the autonomy of the EU legal order.

[1] Differentiating Achmea

The CJEU in its opinion explicitly stated that Section F of Chapter 8 of CETA (entitled 'Resolution of Investment Disputes Between Investors and States') *must* be distinguished from a BIT between EU Member States which was at issue in *Achmea*.[140] As held by the CJEU in *Achmea* itself, 'The question of compatibility, with EU law, of the creation or preservation of an investment tribunal by means of such an agreement

134. Opinion 1/17 of the CJEU, 30 April 2019 (Opinion 1/17), para. 106.
135. *Ibid.*, paras 113–115.
136. *Ibid.*, para. 118.
137. *Ibid.*
138. *Ibid.*, para. 122.
139. *Ibid.*, para. 131.
140. *Ibid.*, para. 126.

between EU Member States must be distinguished from the question of the compatibility, with EU law, of the creation of such a tribunal by means of an agreement between the Union and a non-Member State.'[141]

The CJEU went on to note that, while EU Member States are, in any area that is subject to EU law, required to have due regard to the principle of mutual trust, 'the principle of mutual trust, with respect to, inter alia, compliance with the right to an effective remedy before an independent tribunal, is not applicable in relations between the Union and a non-Member State'.[142]

Accordingly, it concluded that Section F of Chapter 8 of CETA was compatible with EU law. Given the uncertainty generated by *Achmea* on the future of ISDS with EU Member States, the *Opinion 1/17* provides some clarity on the applicability of *Achmea* to BITs with non-EU Member States. The ruling of the CJEU upholding the ISDS mechanism envisaged in the CETA is a huge breakthrough for the ISDS reforms put forth by the EU. Given that the EU-SIPA and the EU-Vietnam FTA also have ISDS provisions similar to the CETA, the Opinion provides clarity in respect of the compatibility of the ISDS mechanisms contained therein with EU law.

§11.04 CONCLUSION

The decision of the CJEU in *Achmea* was rendered at an important juncture, especially when there was growing criticism globally, and in particular in the EU, against ISDS. Undoubtedly, *Achmea* has direct implications on investor-State arbitrations under intra-EU BITs, and since then various tribunals faced with determining the impact of *Achmea* on investment-treaty arbitrations have favoured a narrow interpretation, restricting the decision in *Achmea* to the specific facts of that case. Twenty-three EU Member States have, however, recently come out in support of *Achmea* by signing an agreement to terminate some 130 intra-EU BITs, declaring that intra-EU BITs can no longer serve as a legal basis for arbitration proceedings.

It would be interesting to see how the Singapore courts, which is not an EU Member State, would have dealt with the *Achmea* arguments. The authors postulate that the Singapore courts, in their supervisory capacity, would apply general principles of treaty interpretation when confronted with jurisdictional challenges based on *Achmea* arguments, including Article 30 of the VCLT and *lex specialis*, which principles might not have been fully argued and/or received full consideration before the CJEU.

From the perspective of an enforcement court, if public policy was invoked as a ground for refusing enforcement of an award invoking *Achmea* arguments, the Singapore courts are likely to respect the findings of a tribunal and might intervene only in cases where the tribunal's finding is perceived not as a finding of fact but a question of law concerning whether an intra-EU arbitral award would constitute 'palpable and indisputable illegality'.

141. *Ibid.*, at para. 127; *see Achmea*, paras 57–58.
142. Opinion 1/17, paras 128–129.

The authors suggest that ASEAN, as a regional bloc, can take guidance from the decision in *Achmea* and the most recent declaration by twenty-three EU Member States effectively denouncing the legal basis for investor-State arbitration for intra-EU BITs following from *Achmea*, bearing in mind that various BITs among ASEAN Member States and the ASEAN Comprehensive Investment Agreement currently allows for investor-State arbitration.

Amidst the backlash against ISDS mechanism in the traditional BITs and the implications of *Achmea*, the birth of the EU-SIPA is a huge milestone in the promotion of investments between EU Member States and Singapore. An efficient dispute resolution mechanism is the *sine qua non* for promoting investments. The EU-SIPA reflects the EU's new approach to ISDS. It might be too early to analyse whether the proposed ICS will revolutionise ISDS. However, the ICS has tried to address most concerns and challenges faced by the current system of ad hoc arbitral tribunals. More importantly, the CJEU's confirmation regarding the compatibility of the ICS under the CETA with EU law is a huge breakthrough for EU's new approach to ISDS and creates greater certainty for the future regime, at least in the context of compatibility of the ISDS provisions in the EU-SIPA with EU law.