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Completing the Woodcut: On the Feasibility of an Intra-EU Investment Court

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Abstract

In theory, the ECJ's judgment in C-284/16 *Slovak Republic v. Achmea BV* marked the end to intra-EU investment arbitration under bilateral or multilateral investment treaties. In practice, the underlying grievances remain. That need for a workable post-*Achmea* dispute settlement system for intra-EU investment disputes was highlighted once more by the Commission's 2020 Inception Impact Assessment on an Investment Protection and Facilitation Framework, which showed a clear preference for an institutionalised path for resolving such disputes. This working paper accordingly seeks to discuss the policy proposals voiced to-date. It assesses respectively the legal feasibility of conferring jurisdiction to the CJEU and treating intra-EU investment disputes through a specialized chamber or a specialized investment tribunal attached to that institution; a self-standing intra-EU investment court modelled on the Unified Patent Court; as well as the idea of 'docking' intra-EU investment disputes to a third body standing 'outside' the system of judicial remedies of the EU legal order. Of those options, the working paper concludes that a self-standing intra-EU investment court appears a (legally) feasible and an institutionally attractive option, both for investors and the Member States, for the future of intra-EU investment disputes.

Key words

Intra-EU investment arbitration – EU law – *Achmea* – investment court – Article 273 TFEU – Opinion 1/09 – Unified Patent Court – *Parfums Christian Dior* – Benelux Court – Opinion 1/17

Biography of the author

Nicolaj Kuplewatzky is a legal secretary (référendaire) in the chambers of Advocate General Ćapeta at the Court of Justice of the European Union and an adjunct lecturer at the University of Cologne. Prior to that, he served as a référendaire in the chambers of Advocate General Bobek and as a member of the Legal Service at the European Commission with a special focus on EU economic law. In the latter capacity, he formed part of the team tasked with intervening in all intra-EU investment arbitrations as well as in enforcement actions before national courts in Belgium, England & Wales, Luxembourg, Sweden, Romania, as well as the U.S. District Courts for the District of Columbia and the Southern District of New York. He completed his studies at the universities of Buckingham, Tsinghua, Hong Kong and Columbia. Nicolaj is a member of the editorial and review boards of the Global Trade and Customs Journal and the Revista General de Derecho Europeo and is admitted as an attorney-at-law in New York State.

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Completing the Woodcut: On the Feasibility of an Intra-EU Investment Court

Nicolaj Kuplewatzky [1]

A. Introduction

Albrecht Dürer's woodcut of an Indian rhinoceros in not an accurate representation of the real animal. It is thought that he never saw a rhinoceros in the flesh. And yet, his is a surprisingly precise depiction of the 'beast' which arrived as a present from Goa to Portugal for King Manuel I.

In 2015, the delegations of a number of capital-exporting Member States sat together at an 'informal technical meeting' in the Council to discuss the day after the termination of intra-EU bilateral investment treaties ('BITs'). The thoughts exchanged at that meeting resulted, in 2016, in the distribution of a Non-Paper on the future of intra-EU investment treaties to the Council's Trade Policy Committee ('2016 Non-Paper')[2]. That paper, inter alia, floats three options for a binding and enforceable investment dispute settlement mechanism after the 'phasing out' of intra-EU BITs. First, it proposes to rely upon Article 273 TFEU to confer jurisdiction in intra-EU investment disputes to the ECJ. Second, the 2016 Non-Paper introduces the idea of a self-standing specialised court with access to the preliminary ruling procedure, modelled on the Unified Patent Court ('UPC'). Third, the Member States considered it possible to enter into a 'compromis', within the meaning of the 1907 Hague Convention for the Pacific Settlement of International Disputes to assign intra-EU investment disputes to an existing dispute settlement body outside the EU judicial system (such as the Permanent Court of Arbitration ('PCA')).[3]

Fast forward a few years, and the judgments in *Achmea*,[4] *Komstroy*,[5] *PL Holdings*,[6] and *Commission v European Food*[7] have made a discussion of those proposals on inevitability. In its 2020 Inception Impact Assessment on an Investment Protection and Facilitation Framework ('Inception Impact Assessment'),[8] the Commission takes on some of the 2016 Non-Paper ideas. It adds suggestions of its own (such the development of an 'Ombudsman-like EU administrative body' or a specialized SOLVIT database).[9] There have also been voices suggesting a specialized chamber at the European

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1 Référendaire in the Chambers of Advocate General Ćapeta at the Court of Justice of the European Union. The author wishes to thank Ana Bobić for her helpful comments on an earlier draft. The opinions herein are entirely my own.

2 *General Secretariat of the Council of the European Union (Trade Policy Committee)*, Intra-EU Investment Treaties Non-paper from Austria, Finland, France, Germany and the Netherlands, p. 2, highlighting the need for 'an appropriate level of substantive and procedural protection for EU-Investors so that the phasing-out of intra-EU BITs do not result in any gaps in the protection of cross-border investment within the internal market'.

3 Ibid.

4 CJEU, case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158 ('*Achmea*').

5 CJEU, case C-741/19, *Republic of Moldova v. Komstroy LLC*, ECLI:EU:C:2021:655 ('*Komstroy*').

6 CJEU, case C-109/20, *Republiken Polen v. PL Holdings Sàrl*, ECLI:EU:C:2021:875 ('*PL Holdings*').

7 CJEU, case C-638/19 P, *European Commission v. European Food SA and Others*, ECLI:EU:C:2022:50 ('*Commission v. European Food*').

8 *European Commission*, Inception Impact Assessment, Regulation establishing a framework for intra-EU investment protection, facilitation and dispute resolution (ARES(2020)2716046).

9 Ibid, p. 4 (suggesting both options as an alternative to seeking resolution through a national or EU level court-like system).

Court of Justice ('ECJ') or the General Court ('GC'), or even a specialized tribunal attached to the GC.[10]

Alas, like Dürer's woodcut, all of those proposals are short of detail on the legal feasibility of the respective policy options. In this contribution, I will accordingly seek to make that assessment with a view to recommending a workable post-*Achmea* dispute settlement system for intra-EU investment disputes. That discussion is subject to a few asterisks. First, the below analysis will be limited to the normative requirements for a court or tribunal tasked with resolving intra-EU investment disputes. Second, it is assumed that there is no political appetite for Treaty change. Third, given the reality of engaging the international responsibility of States and the thusly needed de-politicisation of disputes, it is also assumed that the involvement of specialized hybrid court branches at the level of the national judiciaries is not a viable alternative.[11] Fourth, in the light of the need for the actual resolution of disputes, it appears inapposite to discuss the non-binding dispute resolution alternatives proposed in the Inception Impact Assessment.

This contribution is structured as follows. First, I shall consider the possibility of resolving intra-EU disputes 'in-house', that is to say by the CJEU (II). That discussion will look at, first, the conferral option by means of Article 273 TFEU, as proposed by the Member States in their 2016 Non-Paper (II.A); second, the possibility for a specialized chamber at either the ECJ or the GC (II.B); as well as, third, the idea of establishing a separate investment tribunal attached to the GC (II.C). I will conclude that section with some interim reflections (II.D). Thereafter, the discussion will turn to the 'outside' options for such a dispute settlement system. In this regard, I will consider the proposal for a self-standing intra-EU investment court modelled on the UPC (III). That section shall take account of both substance requirements (III.A) as well as a possible legal basis (III.B). Finally, I shall discuss the possibility of assigning jurisdiction to a 'third' body, by means of a 'compromis' between the Member States (IV). I shall conclude that the legally most defendable solution would be a self-standing investment court modelled on the UPC. However, under the current state of the case-law, it even appears that a 'docking' to a third body may be possible, so long as the 'commonality' requirement arising from *Parfums Christian Dior*[12] (as repeated in Opinion 1/09 (*Agreement creating a Unified Patent Litigation System*))[13] is satisfied (V).

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10 See *Moskvan*, p. 211 and *Paschalidis*, The pressing need for a European investment court, available at: https://globalarbitrationreview.com/the-pressing-need-european-investment-court (24/10/2022).

11 Although, as *Moskvan* (ibid.) notes, such specialized national courts are a third alternative. Moreover, sight need not be lost of the many possibilities for a melange between national court branches specialized in investment arbitration and enabling such courts to fit the existing system within the framework of Article 267 TFEU. While that would not address the distrust in national judicial systems, there remains always the possibility for recourse to a 'super-charged' *juge d'appui*; that is to say a national judge designated by the procedural law of a Member State competent to act as interlocutor/review-mechanism between questions on the interpretation/application of EU law and the on-going work of the arbitration tribunal. See, by analogy, *Fernández Rozas*, 'Le rôle des juridictions étatiques devant l'arbitrage commercial international', The Hague Academy of International Law, Collected Courses, Volume 290 (2001), p. 130 (noting that this type of intervention, 'utilisée avec modération, ne peut que favoriser l'arbitrage' and that, as regards the interpretation of EU law, 'rien ne s'oppose à ce que l'arbitre demande l'aide du juge pour l'interprétation d'une règle qui exige la présentation d'une question préjudicielle'). However, for that to work, the national judge needs to be equipped with full powers of review under national law of all elements of analysis of the arbitration tribunal. See, in this regard, CJEU, case C-741/19, *Republic of Moldova v. Komstroy LLC*, ECLI:EU:C:2021:655, paras 57 and 58 (requiring full powers of review by a competent Member State court so that the fundamental provisions of EU law can be examined in the course of that review and thus, if necessary, be brought to the ECJ for a preliminary ruling).

12 CJEU, case C-337/95, *Parfums Christian Dior SA and Parfums Christian Dior BV v. Evora BV*, ECLI:EU:C:1997:517.

13 CJEU, Opinion 1/09, Agreement creating a Unified Patent Litigation System, ECLI:EU:C:2011:123.

B. Jurisdiction of investment disputes by the CJEU

I. Getting there

Under Article 19(1), first subparagraph, TEU, the CJEU ensures that, in the interpretation and application of the Treaties, EU law is observed. It exercises its powers in respect of disputes which come within the scope of the provisions of the Treaties. Once modest, that scope now encompasses not just disputes falling within the *Kompetenzkatalog* of the Union, but an ever-increasing area of law.[14] The protection of investments within the territory of the Treaties falls within the scope of EU law.[15] As such, the CJEU would naturally have jurisdiction to decide on disputes between natural and legal persons and the Member States relating to intra-EU investments (in whatever form). However, accessing that jurisdiction is the real elephant in the room. Given the multilevel judiciary of the EU legal order, access to the ECJ by natural or legal persons is primarily dependent on preliminary references from the national courts. Direct actions are more restricted, for even where an EU measure would lead to the interference with the right to enjoy an investment, the conditions of standing are notoriously difficult to meet.[16] In other words, there are two natural avenues by which (investor) disputes could reach the CJEU to decide on the compatibility, with EU law, of certain Member State or Union measures, such that their disputes could then be assigned either to a specialized chamber or a specialized tribunal. However, as DG FISMA of the Commission itself has previously noted: 'the added value [of that idea] is limited as investors could not have legal standing to bring claims directly to the CJEU even in a specialised chamber'[17].

What then are the prospects of a third avenue of offering (systematised) direct access, at least to the ECJ? Pursuant to Article 273 TFEU, the ECJ can be conferred jurisdiction in any dispute between the Member States which relates to the subject-matter of the Treaties. Assignment may happen by means of a general dispute settlement provision in an agreement between (a limited

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14 On the broad mapping and development of the material scope of EU law, see *Ćapeta*, in: Łazowski/Blockmans (eds.), pp. 268 - 270.

15 See, to that effect, CJEU, case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158, para. 42 (finding that such a link is inter alia reflected in the provisions on the fundamental freedoms, including the freedom of establishment and the free movement of capital). See also, as regards the protection afforded by the latter right in cases of (indirect) expropriation, CJEU cases C-52/16 and C-113/16, *'SEGRO' Kft. v. Vas Megyei Kormányhivatal Sárvári Járási Földhivatala* and *Günther Horváth v. Vas Megyei Kormányhivatal*, ECLI:EU:C:2018:157, para. 129 (relating to the EU-law compatible nature of legislation bringing about the extinction of rights of usufruct acquired by contract over agricultural land). Consider further that the Commission takes the position that 'EU law protects all forms of EU cross-border investments throughout their entire life cycle.' See *General Secretariat of the Council of the European Union* (Trade Policy Committee), Intra-EU Investment Treaties Non-paper from Austria, Finland, France, Germany and the Netherlands, p. 3. See finally the impressive analysis by *Moskvan*, pp. 6 - 23, who, as regards the personal and material scope of protection of EU law concludes that 'intra-EU protection pursuant to EU law may still offer functionally equivalent or perhaps even more (or less) extensive protection in some cases.'; ibid, p. 200.

16 Consider, however, the promising development arising from CJEU, case C-348/20 P, *Nord Stream 2 AG v. European Parliament and Council of the European Union*, ECLI:EU:C:2022:548, para. 67 (finding direct concern, on the part of a legal person, to challenge an amendment to an EU directive, by placing 'substance' over 'form', in a scenario where said amendment extended the scope of the rules of Directive (EU) 2019/692, OJ L 117 of 17.04.2019, p. 1 to situations and addressees, such as the applicant, which were not previously caught by those rules).

17 *European Commission*, Minutes of the 9th Meeting of the Member States' Expert Group on intra-EU investment environment, pp. 1 and 2, available at: https://ec.europa.eu/transparency/expert-groups-register/screen/meetings/consult?lang=en&meetingId=22373&fromExpertGroups=true (24/10/2022).

group of) the Member States.[18] Thereby, an entire 'class' of disputes could be assigned to the ECJ,[19] at least so long as any resulting dispute has an objectively identifiable link with the subject-matter of the Treaties.[20] However, the confines of that idea arguably lie in the limitation of Article 273 TFEU to disputes 'between the Member States'. In *Pringle*, the ECJ appeared open to extend that wording also to the European Stability Mechanism ('ESM') as party, that is to say a body established by the ESM Treaty, which is not a Member State, and thus a 'third party' to the ESM Treaty.[21] That logic would assume the possibility of 'assignment', by means of an agreement between the Member States, of possible parties to a dispute brought under Article 273 TFEU. In that way, jurisdiction could be granted to the ECJ through the 'standing offer to arbitrate' logic.[22]

However, does Article 273 TFEU really allow for assignment of such an unspecified class of applicants? That is questionable. It appears that the reason given by the ECJ in *Pringle* as to the presence of the ESM in disputes under the ESM Treaty was linked to the ESM's mandate arising from a treaty to which only the Member State could be signatories. That is quite different from extending jurisdiction to subjects of a Member State's legal order (apart from the fact that such a type of assignment assumes the presence of intra-EU investment agreements to which the Member States are signatories).

Moreover, the ECJ's position on standing offers to arbitrate appears unresolved. On the one hand, in the judgment in *Commission v European Food and Others*,[23] the ECJ explained that standing consent by a Member State to BIT dispute settlement 'does not originate in a specific agreement reflecting the freely expressed wishes of the parties concerned'[24]. On the other hand, in Opinion 2/15 (*EU-Singapore Free Trade Agreement*), despite expressing no opinion on the compatibility of the content of that agreement, and although relating to an entirely different question of law, the ECJ appeared less preoccupied with the EU-Singapore Free Trade Agreement's standing offer to arbitrate than with the possibility of removing jurisdiction of such disputes from national courts.[25] Provided either of those precedents can be extended to assignments by means of standing offers to arbitrate at the

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18 See, by analogy, CJEU, case C-370/12, *Thomas Pringle v. Government of Ireland and Others*, ECLI:EU:C:2012:756, para. 172 (finding that the reference to 'special agreement', in Article 273 TFEU, does not prevent the Member States from designating the ECJ as arbiter of disputes by means of a dispute settlement provision in an international agreement).

19 See to that effect, ibid. para. 172 (finding that an advance agreement 'with reference to a whole class of pre-defined disputes' satisfies the Article 273 TFEU standard).

20 See CJEU, case C-648/15, *Republic of Austria v. Federal Republic of Germany*, ECLI:EU:C:2017:664, para. 25 (explaining that '[t]he condition laid down in Article 273 TFEU that the dispute should be related to the subject matter of the treaties is therefore satisfied when it is established that the dispute brought before the Court has an objectively identifiable link with the subject matter of the Treaties.')

21 See CJEU, case C-370/12, *Thomas Pringle v. Government of Ireland and Others*, ECLI:EU:C:2012:756, para. 175 (holding that 'since the membership of the ESM consists solely of Member States, a dispute to which the ESM is party may be considered to be a dispute between Member States within the meaning of Article 273 TFEU').

22 See, in this regard, Opinion of Advocate General Wathelet in CJEU, case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2017:699, point 154 (explaining that 'the investor is not exercising a right of his own but a right which that BIT confers on his State of origin'). See also, more generally, *Paulsson*, ICSID Review, 1995/10, pp. 232 - 257.

23 CJEU, case C-638/19 P, *European Commission v. European Food SA and Others*, ECLI:EU:C:2022:50.

24 Ibid, para. 144.

25 Opinion 2/15 of the Court, EU-Singapore Free Trade Agreement, ECLI:EU:C:2017:376, paras 288 - 292 (specifically referring to a prior paragraph highlighting the purely competence-related nature of the opinion before it, but then, when explaining the outlines of the envisaged dispute settlement system, including the standing offer to arbitrate, inserting a sentence on said regime 'remov[ing] disputes from the jurisdiction of the courts of the Member States').

international law plane, the *Commission v European Food and Others* reasoning would bar recourse to Article 273 TFEU as insufficiently direct, whereas the Opinion 2/15 (*EU-Singapore Free Trade Agreement*) reasoning implicitly appears content with that possibility. And yet, the question remains why that distinction did not really enter the discussion in *Pringle*. One clue may lie in the View of Advocate General Kokott in *Pringle*, who noted that 'a dispute between an ESM Member and the ESM is in fact, or at least can be assimilated to, a dispute between the ESM Member and the other ESM Members, who within the ESM have adopted a majority decision be followed.'[26] That logic certainly appears transposable to other scenarios. Thus, if sufficiently clear at the outset, there could be some merit in arguing that a dispute settlement provision, in an agreement between two Member States, assigning standing jurisdiction to a restricted class, or a restricted type of cases, to the ECJ should be compatible with the Article 273 TFEU logic of *Pringle*. In other words, a sort of individualising measure within a separate agreement between the Member States. Where, in turn, the required clarity would be lacking, such as, for instance, where the offer to arbitrate is too general or insufficiently precise so as to identify a clearly-demarked group of potential claimants, jurisdiction would then be precluded.

Whichever way an investment dispute reaches the CJEU, how could it be dealt with?

II. A specialised chamber at the ECJ or the GC

The specialisation of chambers, be that at the GC or the ECJ, is an evergreen topic.[27] With specialisation comes synergy, and thus expertise, on the side of the bench, as well as legal certainty, on the side of litigants. Despite those benefits,[28] specialisation at the ECJ never quite took off.[29] That said, since 2019, the GC is operating a (limited) system of specialised chambers for civil service and intellectual property cases.[30] Even at the ECJ, it has been observed that the system of '*connexité*' already now functions as a cautious means of specialisation among the Judges-Rapporteur and the Advocates-General.[31]

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26 View of Advocate General Kokott in CJEU, case C-370/12, *Thomas Pringle v. Government of Ireland and Others*, ECLI:EU:C:2012:675, point 189.

27 See, for instance, *Öberg/Ali/Sabouret*, in: Derlén/Lindholm (eds.), p. 212, who argue that '[s]pecialisation could contribute to fulfil the General Court's founding promise of improving the judicial protection of individual interests, in particular in proceedings requiring a close examination of complex facts, and maintaining quality and effectiveness of judicial review in the EU legal order'. See also, more generally, *Montag/Hoseinian*, in: Hawk (ed.).

28 In 1988, the Commission pleaded for specialisation in its guidelines concerning the establishment of the Court of First Instance, suggesting the creation of two specialised chambers (for administrative and economic law cases), and for the recruitment of judges specialised in these areas. See *European Commission*, Establishment of a Court of First Instance - Preliminary guidelines adopted by the Commission for the preparation of an opinion on the proposal put forward by the Court of Justice for a Council Decision establishing a Court of First Instance (CFI) and amending the Statutes of the Court of Justice, SEC (88) 366 final, pp. 2 and 3.

29 Although, as Judge Forwood confirmed to the House of Lords European Union Committee in 1999, 'when trade mark law was a new area of work for the [General Court], in order to achieve consistency of judgment in the evolving case law, all trade mark cases were remitted to a particular chamber of the Court'. See *House of Lords* (European Union Committee), The Workload of the Court of Justice of the European Union, para. 120, available at: https://publications.parliament.uk/pa/ld201011/ldselect/ldeucom/128/12810.htm#a38 (24/10/2022). See also *Öberg/Ali/Sabouret*, in: Derlén/Lindholm (eds.), p. 220 (explaining further that 'two specialised chambers for intellectual property cases were operational between 1998 and 2003 and a specialised *chambre des pourvois* was created to deal with appeals against decisions of the Civil Services Tribunal').

30 *Court of Justice of the European Union*, The General Court of the European Union prepares to welcome additional Judges, Press release No. 111/19, p. 1.

31 See, for instance, *Dehousse*, Egmont Paper 83, 2016, pp. 60 - 61 (referring to that attribution key as a 'nascent form of specialisation').

Legally, one (or more) specialised investment chamber(s) could be set up in accordance with Article 25(1) of the Rules of Procedure of the GC. That would also alleviate the role of the Vice-President of the GC, which, so far, was tasked with the role of ensuring legal coherence among judgments. Specialisation of chambers could similarly act as a catalyst to appoint an Advocate General at GC level, which is possible under Article 30 of the same rules of procedure, potentially also specialized on investment matters, to provide a thorough (independent and thus third) opinion on the dispute before the chamber. Similar considerations apply for a specialized chamber at the ECJ level, set up in accordance with Article 60(1) of the latter's rules of procedure.

There is one immediate drawback of a specialized chamber within an established institution. The first is the composition of any specialized chamber. Said chamber would be composed of judges of the GC or the ECJ. For the purposes of their mandate, those judges are EU law generalists (even if they may hold a particular interest, or prior specialization, in a specific area of law). That type of composition, in turn, does not address the criticism of lack of expert knowledge of arbitration and/or (international) investment law. In reality, there is little lasting engagement with arbitration in general. [32] In response, as is done in a number of national systems,[33] a specialized chamber could be composed of both, EU judges and lay experts (in arbitration/investment/international law).[34] Those 'non-permanent judges' could be appointed on an 'ad hoc' basis, from a previously drawn-up roster of eligible candidates.[35]

III. A specialized tribunal attached to the GC

In many Member States, there are specialized tribunals on which expert judges are empanelled for areas of law that are complex or exhibit other special features.[36] At the level of EU law, recourse

32 Which has led to the (hasty) reputation among arbitration practitioners that the CJEU is averse to arbitration. Take the example of the often-criticised 'West Tankers' judgment. That judgment must be viewed through the prism of the arbitration exception of Regulation (EC) No. 44/2001, OJ L 12 of 22/12/2000, p. 1: merely because jurisdiction before the ordinary courts is contested on the basis of an agreement to arbitration makes that regulation's rules no less applicable to the dispute; see CJEU, case C-185/07, *Allianz SpA and Generali Assicurazioni Generali SpA v. West Tankers Inc.*, ECLI:EU:C:2009:69, para. 24 in particular. The question of whether arbitration should be exempted from the scope of Regulation (EC) No 44/2001 (or its successor) is then an entirely different one, which is not for the ECJ to decide. See, for instance, CJEU, cases C-106/19 and C-232/19, *Italian Republic and Comune di Milano v. Council of the European Union and European Parliament*, ECLI:EU:C:2022:568, para. 146 (and the case-law cited). The principle of institutional balance implies that it is for the EU legislature alone to decide the content of a measure.

33 For instance, in the area of competition law, in Austria, the Supreme Cartel Court (16th panel of the Supreme Court) acts as specialized chamber competent to hear appeals from the Cartel Court on points of law ((§ 58 II KartG). It is composed of three professional judges and two lay experts. Similarly, the Court of Appeal of Brussels is competent to hear cases concerning the public-law control of national competition authority decisions at first instance. It has two specialised chambers (one in Flemish and one in French), each sitting with three judges.

34 Such a combination of profiles is already proposed for the UPC; see Article 15 UPCA, which explains that 'the Court shall comprise both legally qualified judges and technically qualified judges'.

35 See, for instance, the pool of individuals eligible for appointment as arbitrators and trade and sustainable development experts in bilateral disputes under trade agreements with third countries; *European Commission*, Stepping up trade agreements enforcement: the European Commission publishes pool of individuals eligible for appointment as arbitrators and TSD experts, available at: https://policy.trade.ec.europa.eu/news/stepping-trade-agreements-enforcement-european-commission-publishes-pool-individuals-eligible-2022-06-23_en (24/10/2022). See also, in that regard, Article 16 UPCA, which explains that the Advisory Committee sets up a similar roster for suitable candidates to be appointed as judges of the UPC Court.

36 On that account, *Jacobs/Münder/Richter*, German Law Journal 2019/20, p. 1221 (alleging that such specialisation would be the only way to ensure that judgment of sufficient quality are issued within a short period of time).

to such a type of tribunal also reaches back as far as 1978.[37] Akin to creating trial courts at the EU 'federal' level, there was even discussion of multiple first instance courts of subject-matter specialisation.[38] However, recourse to the possibility for a specialised tribunal was made only once, and then solely in relation to disputes within the civil service of the EU.[39] The resulting Civil Service Tribunal, which commenced its work in 2005, ceased operations in 2016.[40]

Article 19(1) TEU specifically speaks of specialized courts as part of the CJEU architecture. The rules for the establishment of those courts are set out in Article 257 TFEU. That provision clarifies that said specialized courts are 'attached to the GC', and thus not self-standing (or external to the CJEU). Moreover, the first subparagraph of Article 257 TFEU also explains that such courts would hear and determine classes or actions of cases, at first instance, 'in specific areas'. That latter concept is not further elaborated in the Treaties. It must thus be assumed that it falls to the EU legislator, in line with the attribution of competences to the Union, to decide which areas should be covered by the jurisdiction of a specialized tribunal. Once that decision is made, the discretion of actually establishing said court by means of regulation is left, in line with the first and third subparagraphs of Article 257 TFEU, to the European Parliament and the Council (subject to the initiative of the Commission or the ECJ, and the requirement for consultation of the respective other institution).

Although not required by Article 257 TFEU, some link to EU law would be required to establish a dedicated tribunal for the purpose of resolving disputes relating involving EU investors and the Member States. That arises not least from the mandate of the CJEU, such that there will be a need to make stipulation for the applicable law in a particular dispute.

Organisationally, there is little doubt that a specialized investment tribunal could hierarchically fit well within the existing judicial structure of the CJEU. Article 257(5) TFEU requires said tribunal to set up its own rules of procedure. That would allow for the adoption of arbitration-specific rules, or the possibility to simply adopt progressive model rules of existing arbitration institutions. The latter would likely be preferred by the arbitration community, and would arguably also add to the legitimacy of the specialised tribunal. Furthermore, the investment tribunal could make use of the GC's existing institutional structure, including that of its registry.[41]

Article 256(2) TFEU designates the GC as the competent jurisdiction for appeals from specialized tribunals. Article 257(3) TFEU then leaves the discretion on the scope of such appeals to the

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37 See *Naômé*, point. 1.06 (explaining that, in 1978, H. Kutscher, President of the ECJ at the time, suggested by means of memorandum that a court of first instance be created with jurisdiction to hear staff cases).

38 See, for instance, the idea of a customs and social security court, in *Brown/Kennedy*, p. 366.

39 Although certainly (then) Court of First Instance President Jaeger floated the idea of a specialised court for intellectual property litigation (in particular EU trademark cases, which continue to occupy a large part of the work of the General Court). See *Jaeger*, Ist die Zeit reif für eine Reform?, available at: https://curia.europa.eu/jcms/jcms/P_52392 (24/10/2022). See also *CJEU*, Response to the invitation from the Italian Presidency of the Council to present new proposals in order to facilitate the task of securing agreement within the Council on the procedures for increasing the number of judges at the General Court, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2015-05/8-en-reponse-274.pdf (24/10/2022) ('the plenary meeting of the General Court stated its preference for the establishment of a specialised trade mark court and for the status quo to be maintained as regards the [Civil Service Tribunal]').

40 See Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, OJ L 341 of 24/12/2015, p. 14, recital 9 (explaining that, at the request of the ECJ, jurisdiction was transferred to the General Court to assist with the backlog of pending cases).

41 Although, for instance, the Civil Service Tribunal had its own registry and secretariat.

ordinary legislator. These may concern appeals on law only, or also on matters of fact. While there may be a certain danger of extending the appeal process, given the lack of administrative fact-finding prior to an investment dispute, there is likely to be a preference to extend appeals to challenges in law and fact.[42] That way, the GC would be given the (unenviable) task of reviewing factual as well as substantive and procedural issues (such as relating to interlocutory decisions or decisions on leave to appeal). Article 256(2), second subparagraph, TFEU assumes a role for the ECJ at the hierarchical apex, and allows any further appeals on specific (constitutional) issues of law only. Such an arrangement would make efficient use of the existing 'leave to appeal' system (already in place for a number of areas on appeal from the GC),[43] pursuant to which only 'issues significant with respect to the unity, consistency and development of EU law' could make their way to the ECJ.[44] That way, a third layer of review would ensure the uniformity (and legitimacy) of all legal questions of a horizontally-important nature.

So as to further preserve subject-matter recognition, the composition of any specialised investment tribunal could be mixed, or 'ad hoc' even (potentially drawing from a roster of candidates drawn up previously; see page 10 above). Consider also that there is precedent in amending the Statute of the CJEU to allow for the possibility to attach temporary judges to the specialized tribunals created under Article 257(1) TFEU.[45]

At the same time, it would be foolish to disregard the CJEU's opposition, during the reform process of the GC, of the creation of specialised courts of subject-matters falling within the horizontal competence of the latter, given that that institution must be consulted as part of any legislative process under Article 257(1) TFEU.[46] Generally speaking, it should also be observed that a specialized tribunal under the auspices of the GC would add a subject-specific discipline that, realistically, would be of little use to the jurisdiction as a whole,[47] particularly if the case-load is time-limited or if investors chose to restructure their intra-EU investments through third countries

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42 Note that this differs from the procedure applicable, at the time, to the Civil Service Tribunal. See Article 11(1) of Annex I to the Statute, which limited appeals to the General Court in law only.

43 Regulation (EU, Euratom) 2019/629 of the European Parliament and of the Council of 17 April 2019 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, OJ L 111 of 25/04/2019, p. 1, Article 1(2) (detailing that cases already having gone through two instances of appeals should not proceed further 'unless the Court of Justice first decides that it should be allowed to do so').

44 Since the introduction of the 'leave to appeal system', the ECJ has only once deemed a case to satisfy that threshold; see ECJ order, Case C-382/21 P, *European Union Intellectual Property Office (EUIPO) v. The KaiKai Company Jaeger Wichmann GbR*, ECLI:EU:C:2021:1050, para. 34.

45 Regulation (EU, Euratom) No. 741/2012 of the European Parliament and of the Council of 11 August 2012 amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto, OJ L 228 of 23/8/2012, p. 1, Article 1 (relating, however, solely to the possibility to cover the absence of judges who are prevented from participating in the disposal of cases for a lengthy period of time).

46 See, *Schima*, Article 257 TFEU, in: Kellerbauer/Klamert/Tomkin (eds.), p. 1771 (explaining that the CJEU based itself on the likely lack of long-term effectiveness of the proposed solution to create a specialised court in the field of intellectual property; the urgency of the situation; the flexibility of the measure envisaged; as well as the need to ensure the consistency of EU law).

47 On the opposing view, see generally *Vandersanden*, p. 88 (complimenting the work of the Civil Service Tribunal, which was subject to similar criticism, as a 'high-quality jurisdiction that gave new and enriching impulse to European civil service case law'; as well as *Union syndicale fédérale des Services publics européens et internationaux*, Resolution on the recasting of the EU's judicial framework and the planned abolition of the Civil Service Tribunal, available at: https://unionsyndicale.eu/wp-content/uploads/2021/05/Resolution-TFP-EN.pdf (24/10/2022).

(thereby removing themselves from the (likely) scope of jurisdiction of any (intra-EU) investment tribunal).[48]

IV. Interim reflection

There appears to be little legal difficulty to either of the above two approaches. Naturally, there will be questions surrounding the composition of such a chamber/tribunal; the law it may resort to; as well as technical and logistical issues. However, those issues appear secondary against the larger benefits of resolving intra-EU investment disputes within an existing institutional framework.

A further benefit derived from resorting to the full-time judiciary of the CJEU is that its judges do not 'double-hat', as some arbitrators occasionally do. If limited to intra-EU disputes, the 'domestic court bias' argument would also not be credible. The CJEU itself is a multilateral court, and thus stands as third party to disputes before it. Granted, under the judicial system of the Treaties, the Member States are deemed privileged applicants, attached to which are a number of procedural benefits. [49] However, that does not make the CJEU judiciary biased in favour of the Member States. In fact, there may be a certain benefit to interventions by multiple Member States, such as in case of similar measures across the Union,[50] or even the EU institutions, where a measure has a horizontal EU policy nexus.[51] Moreover, the (admittedly important) issue of like access, by means of intervention, by 'other' interested parties, such as environmental organisations, could be addressed through a change in the Statute of the CJEU.[52] Finally, and equally going to the question

48 Which is precisely why the Commission brought its infringement action against the United Kingdom in case C-516/22, *European Commission v. United Kingdom of Great Britain and Northern Ireland* (pending), given that it feared that such jurisprudence could, in a post-Brexit world, 'circumvent and undermine the Commission's efforts to ensure the effective implementation of judgments reiterating the primacy of EU law over arbitral awards in the context of intra-EU investment disputes.' See *European Commission*, Sincere cooperation and primacy of EU law: Commission refers UK to EU Court of Justice over a UK Judgment allowing enforcement of an arbitral award granting illegal State aid, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_802 (24/10/2022).

49 One of which is the possibility to intervene in any pending action without the need for evidencing 'interest' in the outcome of proceedings. See, for instance, the first, second, and third paragraphs of Article 40 of the Statute of the Court of Justice of the European Union, which grants intervention rights to Member States and EU institutions, but attaches the same right to conditions in the case of 'non-privileged' applicants (like natural or legal persons).

50 Such as the many arbitration cases challenging Member States' decisions to amend pre-existing incentive regimes applicable to subsidies renewable energy projects. See, for instance, Award of 15 June 2018, *Antin Infastructure Services Luxembourg Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.* (ICSID Case No. ARB/13/31) and Award of 2 May 2018, *Antaris and Göde v. Czech Republic* (PCA Case No. 2014-01).

51 See, for instance, Award of 26 July 2018, *Marfin Investment Group Holdings S.A., Alexandros Bakatselos and Others v. Cyprus* (ICSID Case No. ARB/13/27) or Award of 8 January 2019, *Cyprus Popular Bank v. Hellenic Republic* (ICSID Case No. ARB/14/16 (relating to claims brought by investors in response to the forced restructuring of Greek Government bonds).

52 Currently, interventions are limited to any person 'which can establish an interest in the result of a case submitted to the Court'. See Article 40 of the Statute of the CJEU. That requirement for an interest has been interpreted as covering solely the legal (and not economic) interest of parties. See, in this regard, order of the Vice-President of the Court, case C 12/18 P(I), *United States of America v. Apple Sales International and Others*, ECLI:EU:C:2018:330, paras 8 and 23. See, in this regard, Award of 14 October 2016 *Pac Rim Cayman LLC v. Republic of El Salvador* (ICSID Case No. ARB/09/12), where an investment tribunal admitted a third party submission by a number of civil society groups supporting the host State's decision to deny a mining concession given the potential risks for the local population and the environment.

of accessibility of the ensuing system, a specialized chamber and/or tribunal would satisfy the right of access to an independent tribunal, also for individuals and small and medium-size companies.[53]

C. A permanent intra-EU investment court

I. Structural features and requirements

Under Article 344 TFEU, the Member States undertake not to submit a dispute concerning the interpretation or application of EU law to any method of settlement not embedded within the judicial architecture of the Union.[54] That provision thus complements Article 19(1) TEU, according to which the CJEU alone, as apex court in the judicial architecture of the Treaties, holds the jurisdiction to ultimately ensure the interpretation and application of EU law. Such exclusivity is not a unique feature of EU law.[55] But it is an essential feature of that legal order, as it ensures that the allocation of powers fixed by the Treaties are preserved.[56] Any (potential) threat to the integrity of (even part of) that system is automatically viewed as putting in jeopardy the entire autonomy of EU legal order.[57]

The baseline established by those outlines of the case-law implies, in essence, that any system dispute of dispute settlement between the Union and its Member States, and which is external to the CJEU, cannot circumvent the EU judicial architecture, but must be squarely placed within it. At its heart, that is the message delivered by *Achmea*, *Komstroy*, *PL Holdings*, and *Commission v European Food*.

The difficulty of squaring that circle with regard to intra-EU investment dispute settlement is substantially reminiscent of that relating to the compatibility of the Agreement on a Unified Patent Court ('AUPC').[58] The draft version of that agreement, put to the ECJ in Opinion 1/09 (*Agreement*

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53 See, in this regard, Opinion 1/17 of the Court, EU-Canada CET Agreement, ECLI:EU:C:2019:341 paras 217, 218 and 21 (finding that, so as to ensure, in practice, accessibility of the CETA Tribunal not only by investors who have available to them significant financial resources, the approval of the CETA by the Union would be dependent on a commitment, by the Union, to guarantee access of small and medium-sized enterprises and private individuals through, for instance, a co-financing mechanism).

54 See, in this regard, CJEU, case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158, paragraph 17.

55 For instance, Article III Section 2 of the United States Constitution vests original (and exclusive) jurisdiction in the United States Supreme Court over 'controversies between two or more States'. See also Article 131 of the Constitution of India, which assigns exclusive original jurisdiction to the Indian Supreme Court in all cases between the Government of India and the States of India, or between States themselves. In addition, Article 32 of the Constitution of India grants original jurisdiction to the Indian Supreme Court on all cases involving the enforcement of fundamental rights of citizens

56 See, to that effect, Opinion 2/13 of the court, Accession of the European Union to the ECHR, ECLI:EU:C:2014:2454, para. 201 (explaining that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the EU legal system).

57 To that effect, CJEU, case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158, para. 56 (finding that the mere possibility of interpretation and application of EU law is sufficient to undermine the autonomy of EU law); CJEU, case C-741/19, *République de Moldavie v. Komstroy LLC*, ECLI:EU:C:2021:655, paras 59 and 60 (highlighting that the mere 'possibility' of undermining the effectiveness of EU law is sufficient to render an 'outside' dispute settlement system incompatible with the Treaties); CJEU, case C-109/20, *Republiken Polen v. PL Holdings Sàrl*, ECLI:EU:C:2021:875, paras 46 and 47 (explaining that an '*ad hoc*' dispute settlement system arising from an arbitration clause is 'capable' of calling into question not only the principle of mutual trust but also the preservation of the 'particular nature' of EU law is incompatible with the judicial structure established by the Treaties); and CJEU, case C-638/19 P, *European Commission v. European Food SA and Others*, ECLI:EU:C:2022:50, paras 141 and 145 (finding that the consent, by Romania, to an arbitral tribunal 'which does not form part of the EU judicial system within the second subparagraph of Article 19(1) TEU … lacked any force' from that Member States' accession to the Union).

58 Agreement on a Unified Patent Court, OJ C 175 of 20/6/2013, p. 1.

creating a Unified Patent Litigation System),[59] envisaged the creation of a pan-European patent organisation, established by means of international agreement, whose decisions would be subject, in large measure, to judicial control only by the (thusly-created) Unified Patent Court ('UPC'), an international and decentralized[60] court system set up under said agreement, and thus external to the judicial structure of the Treaties. The ECJ deemed such a system incompatible with the autonomy of the EU legal order.[61] The system, as proposed, would 'alter the essential character' of the structure of EU law.[62] Indeed, the draft AUPC's most characteristic feature was to give exclusive competence to the UPC to apply EU law in the field of patents, all the while divesting jurisdiction from the national courts of the Member State signatories of that competence. That, the ECJ found, was not compatible with the judicial structure of Article 267 TFEU, as that provision envisages the cooperation of the national courts on matters of EU law.[63] Moreover, damages arising from decisions of the UPC in breach of EU law would not be attributable to the Member States (so-called '*Köbler* liability'), so that a failure, by the UPC, to make a reference to the ECJ, or a failure, by the UPC, to abide by EU law generally would remain without remedy.[64]

From those considerations arise two essential pointers for the creation of a (self-standing) intra-EU investment court.

The first is the requirement for 'internalisation' of that body. The draft UPCA, as it was presented to the ECJ, described a court system which was outside the EU's institutional and judicial framework, and to which even non-Member States could adhere. In creating such a system, the ECJ explained, the national courts would be divested of their ordinary powers as '*juges de droit commun du droit de l'Union*'[65] at the national level to interpret, in particular, (what is now) the Unitary Patent Regulation[66] and other secondary EU law, since these retain only those powers which are not subject to the exclusive jurisdiction of the UPC.[67] That focus on the role of Member States' national courts within the judicial architecture of the Union is the most innovative element of Opinion 1/09 (*Agreement creating a Unified Patent Litigation System*), since it recognises the inherent 'tilt', in the 'division of labour', of the system established by the Treaties, 'in the direction of national

59 Opinion 1/09 of the court, Agreement creating a Unified Patent Litigation System, ECLI:EU:C:2011:123.

60 A solution which led *Dehousse* to term the UPC 'the most dis-unified international court'; see *Dehousse*, The Unified Court on Patents: The New Oxymoron of European Law, Egmont Paper No. 60, p. 26.

61 Opinion 1/09 of the court, Agreement creating a Unified Patent Litigation System, ECLI:EU:C:2011:123, para. 89 (finding that the national courts would be deprived of their powers in relation to the interpretation and application of EU law, and the ECJ of its power to reply).

62 Ibid.

63 Ibid, paras 84 and 85 (explaining that the 'tasks attributed to the national courts and to the [ECJ] respectively are indispensable to the preservation of the very nature of the law established by the Treaties').

64 Ibid, paras 86 to 88 (explaining that '[i]t is clear that if a decision of the PC were to be in breach of [EU law], that decision could not be the subject of infringement proceedings nor could it give rise to any financial liability on the part of one or more Member States').

65 Often clumsily translated into English as 'EU law judges'; that is to say national judges of the Member States which, under the system established by Article 19(1) TEU, interpret and apply EU law.

66 Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ L 361 of 31/12/2012, p. 1.

67 Opinion 1/09 of the court, Agreement creating a Unified Patent Litigation System, ECLI:EU:C:2011:123, paras 72 and 73 (explaining the exclusive jurisdiction of the UPC and its role to supplant the national courts of the signatory parties, including those of the Member States, 'of the main part of the jurisdiction *ratione materiae* held, normally, by the national courts').

courts'.[68] Thus, it would not just be sufficient to allow, by means of a preliminary reference procedure, for a dialogue between the ECJ and the 'external' court common to the Member States (whose jurisdiction is exclusive for certain types of disputes), if that means that the national courts are divested of EU law jurisdiction in favour of a court outside the EU judicial architecture.

The resulting system of the now-ratified AUPC follows the ECJ's directions. Following Opinion 1/09 (*Agreement creating a Unified Patent Litigation System*), the Commission redesigned the legal status of the system with the Benelux Court of Justice in mind. In its Opinion, the ECJ had specifically mentioned that that court, common to Belgium, the Netherlands and Luxembourg, and tasked with ensuring uniformity among the rules common to those Member States, would be compatible with the judicial structure of Article 19(1) TEU.[69] The UPCA takes up that hint and now specifically proclaims that its court is 'court common to the Contracting Member States and thus part of their judicial system'.[70]

Those changes matter for the creation of any intra-EU investment court. Given the directions arising from Opinion 1/09 (*Agreement creating a Unified Patent Litigation System*), it is clear that that system of dispute settlement must be 'common' to the Member States, or at least to a number of them.

However, what does that requirement for 'commonality' entail?

It is clear that limiting access *ratione personae* to an intra-EU investment court to EU investors and the Member States only is one piece to the larger puzzle. It also appears that what is needed are certain national law characteristics beyond express assignment through an international agreement.[71] Thus, while in *Achmea*, Advocate General Wathelet deemed an arbitral tribunal arising from a dispute settlement provision of a bilateral investment treaty between two Member States as 'common' to those Member States, the ECJ considered that type of assignment too loose, and thereby not featuring 'any links with the judicial systems of the Member States'[72]. That certainly entails that the mere ratification, by a Member State, of an international agreement assigning jurisdiction to a dispute settlement mechanism not forming part of the domestic courts of that Member States creates an insufficiently-close link to its national system, and thus the system of dispute settlement established by Article 19(1) TEU.[73] And yet, the precise 'qualitative' contours beyond ratification would be required of a 'common' court remain elusive. In *Parfums Christian Dior*, the ECJ's decision to recognise the Benelux Court as 'common' to the judicial system of the Member States was based on the consideration that proceedings before the Benelux Court were but a 'step in the proceedings before the national courts leading to a definitive interpretation of

68 To use the language of *Rosas*, Court Procedures for cooperation between the Court of Justice of the European Union and national courts - contribution by Mr. Allan Rosas, in: Court of Justice of the European Union, European Justice Network, A guarantee of high-quality justice: proceedings of the meeting held on the occasion of the 60th anniversary of the treaties of Rome: Luxembourg, 27 March 2017, p. 67.

69 Ibid, para. 82 (explaining that 'the Benelux Court is a court common to a number of Member States, situated, consequently, within the judicial system of the European Union, [so that] its decisions are subject to mechanisms capable of ensuring the full effectiveness of the rules of the European Union.').

70 UPCA, recital 7.

71 Such as is present in the UPCA, Articles 1(2) and 21.

72 CJEU, case C-284/16, *Slovak Republic v. Achmea BV*, ECLI:EU:C:2018:158, para. 48.

73 To that effect also Opinion of Advocate General Szpunar in CJEU, case C-741/19, *République de Moldavie v. Komstroy LLC*, ECLI:EU:C:2021:655, point 77 (opining that a tribunal established under Article 26 ECT 'is not a part of the judicial system of the Member States … [n]or does it constitute a court or tribunal common to several Member States, since it has no connection with the judicial systems of the Member States').

common Benelux rules'.[74] That would imply rules at national procedural level to assign sole and mandatory jurisdiction to an intra-EU investment court.[75] In other words, there must be national law action beyond the international law affirmation of exclusivity to task a 'common' court with intra-EU investment disputes (the process of which would then be left to the national constitutional requirements of the particular Member State).

However, does that entail that national courts *must* be part of the conversation, such as through a system of internal preliminary references (as is the case with the Benelux Court and the national courts of Belgium, Netherlands, and Luxembourg)? Or can those national courts be absolved of their ordinary competence in favour of a 'one-stop-shop' dispute resolution mechanism before that 'common' court? The answer to this does not arise from the case-law. On the one hand, the ECJ previously considered the Complaints Board of the European Schools not to constitute a 'court or tribunal', for the purposes of Article 267 TFEU, because it lacked a procedural connection to the national courts, and thus was not deemed 'common' enough.[76] Similarly, in *Komstroy*, the ECJ was clear that the national courts must hold full review of 'fundamental provisions of EU law' for a system of arbitration proceedings outside the judicial structure of the Member State to be compatible with EU law.[77] Those judgments could thus be interpreted as requiring a role for the national courts, in some shape or form. On the other hand, there is certainly an argument that removing exclusive jurisdiction from the otherwise-competent national courts to a 'common internal' body does not divest the former type of courts (holding the task of ensuring the interpretation and application of EU law, under Article 19(1) TEU), of their jurisdiction, if the Member States, in their national law, also stipulate that the 'common' court must, forthwith, be considered as the (sole) court competent for those disputes.[78] In effect, such a transfer of competences merely moves jurisdiction from one 'internal' court to another 'internal' court (even if the latter is common to a number of Member States), while the ECJ remains at the apex of that system.[79] In theory, that type of re-organisation of the national judiciary ought to fall within the

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74 CJEU, case C-337/95, *Parfums Christian Dior SA and Parfums Christian Dior BV v. Evora BV*, ECLI:EU:C:1997:517, para. 22.

75 As was the case in the Order of the Court, case C-555/13, *Merck Canada Inc. v. Accord Healthcare Ltd and Others*, ECLI:EU:C:2014:92, paras 19 and 20, where the ECJ found the assignment of exclusive jurisdiction of certain types of disputes to an arbitral body, as satisfying the conditions of Article 267 TFEU.

76 CJEU, case C-196/09, *Paul Miles and Others v. Écoles européennes*, ECLI:EU:C:2011:388, para. 41 (distinguishing the Complaints Board from the Benelux Court, since the former 'does not have any such links with the judicial systems of the Member States').

77 CJEU, case C-741/19, *République de Moldavie v. Komstroy LLC*, ECLI:EU:C:2021:655, paras 57 to 62 (essentially requiring full powers of review by a court of a Member State of an arbitral award decided outside the system of judicial review constituted by Article 19(1) TEU).

78 See, for instance, CJEU, case C-54/96, *Dorsch Consult Ingenieurgesellschaft mbH v. Bundesbaugesellschaft Berlin mbH*, ECLI:EU:C:1997:413, para. 38 (deeming a supervisory board, as the only body competent to review the legality of determinations made by national bodies responsible for reviewing public procurement awards, a 'court and tribunal', despite its organizational placement within the Bundeskartellamt, which is itself subject to supervision by the German Ministry for Economic Affairs.) See also Order of the Court, case C-555/13, *Merck Canada Inc. v. Accord Healthcare Ltd and Others*, ECLI:EU:C:2014:92, paras 19 and 20.

79 See, to that effect, CJEU, case C-337/95, *Parfums Christian Dior SA and Parfums Christian Dior BV v. Evora BV*, ECLI:EU:C:1997:517, paras 22 and 23) (explaining that the Benelux Court, 'faced with the task of interpreting Community rules in the performance of its function, … follow[s] the procedure provided for by [Article 267 TFEU] … [and] therefore serve[s] the purpose of that provision, which is to ensure the uniform interpretation of Community law').

national procedural autonomy of the Member States, given that it does not otherwise appear to affect the allocation of competences of the Treaty (that is to say the system of 'dual vigilance').[80]

It has moreover been argued that the situation of the Benelux Court is special since its existence is sanctioned by primary law, namely Article 350 TFEU.[81] Under that provision, the Treaties 'shall not preclude the existence or completion of regional unions' between the Benelux countries, 'in so far as that region union is further advanced than the internal market'.[82] The argument thus goes that such specific primary law authorization is required for a court to be considered 'common' to be Member States. That position is unconvincing. The Benelux Court certainly appears to have a 'hook', in primary law, to enable its existence. However, in none of its case-law relating to the Benelux Court has the ECJ referred to Article 350 TFEU (or its predecessors) as a reason to sanction that 'common' court's existence. Quite the contrary, when referring to its compatibility with EU law, the ECJ has consistently highlighted the Benelux Court's integration into the judicial system of the Benelux countries, in such a way that the resulting dispute resolution mechanism features the same qualitative criteria as a national court or tribunal, within the meaning of Article 267 TFEU (see pages 15 and 16 above). In other words, even a dispute mechanism that does not copy in full the Benelux Court system could be sanctioned as an EU law-compatible type of integration.[83]

However, structural internalisation of an intra-EU investment court is not the end of the line. Possibly *the* defining feature of a 'common' court tasked with resolving investment disputes is its role of reviewing national and EU measures allegedly undermining or exhausting the value of investments within the territory of the Member State or the Union. That mandate is directly linked to the review of national laws and administrative and judicial acts and measures. Therefore, the jurisdiction of an intra-EU investment court would entail, fundamentally, the interpretation and application of national law, and thereby also EU law (since the latter forms part of the former).[84] Add to that the possibility of an additional link to EU law, either through a provision on applicable law,[85] or the seat of the arbitration,[86] and a hook to EU law jurisdiction (and its required respect for the judicial architecture of the Treaties) would be established either way.[87] That is what

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80 See *Lenaerts/Gutierrez-Fons*, in: Schütze/Tridimas (eds), p. 105 (explaining that the judicial protection of EU rights is based on a system of 'dual vigilance' because 'in addition to the supervision carried out by the European Commission and the Member States, individuals are entitled to rely on their EU rights in the national courts').

81 See *Jaeger*, International Review of Intellectual Property and Competition Law, 2012/43, p. 290 (arguing that the 'existence of the Benelux court is specifically recognized by the Treaties').

82 Which is how the ECJ in judgment of 14 July 2016, case C-230/15, *Brite Strike Technologies Inc. v. Brite Strike Technologies SA*, ECLI:EU:C:2016:560, para. 57, explained the limits to Article 350 TFEU.

83 Along the same line of argument, *Tilmann*, Article 24 Sources of law, in: Tilmann/Plassmann (eds.), p. 470 (arguing that although the remodelled PC 'is integrated into the judicial systems of the Member States in a different way compared with the Benelux Court of Justice, it is a "court common to the Member States"').

84 See, by analogy, CJEU, case C-741/19, *République de Moldavie v. Komstroy LLC*, ECLI:EU:C:2021:655, para. 33) (explaining that 'EU law forms part of the law in force in every Member State').

85 Article 24(1)(a) UPCA expressly stipulates EU law as a source of law of the PC.

86 See, by analogy, CJEU, case C-741/19, *République de Moldavie v. Komstroy LLC*, ECLI:EU:C:2021:655, para. 33) (finding the mere presence of a French 'lexi fori' in the arbitration agreement a sufficient hook to the potential applicability of EU law).

87 In other words, even if no applicable law provision would be contained in the agreement establishing an Intra-EU Investment Court (a presumption, which, albeit unlikely, must be entertained), that court will apply EU law. On the potentiality of such application being enough to trigger the requirements of Article 19(1) TEU, see the case-law at footnote 57 above as well as CJEU, case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117, para. 40 (finding the mere possibility that the Portuguese Court of

distinguishes the idea of an intra-EU investment court from the CETA Tribunal, which famously not only stands outside the EU and Canadian judicial systems, but whose jurisdiction is also additionally limited to the provisions of the CETA.[88] In other words, the (direct or even tangential) use of EU law is the flipside of the 'internalisation coin' requiring placement of the intra-EU investment court squarely within the EU judicial architecture. Those considerations apply '*mutatis mutantis*' even if the intra-EU investment court would be designed to act as a 'fork-in-the-road' institution (alongside the United State District Court model), whereby EU investors would be given the choice of either staying under national court jurisdiction or removing their dispute to the intra-EU investment court.[89]

The second pointer for the envisaged type of dispute system flows from the first and concerns the level of safeguards to ensure the full application of EU law. That entails a measure of review, by the ECJ, through the preliminary ruling procedure, and means of accountability in case of breach of EU law. By virtue of the removal of jurisdiction from national courts in favour of an 'external' dispute settlement system, the draft agreement at issue in Opinion 1/09 (*Agreement creating a Unified Patent Litigation System*) fell short of those requirements. First, while it contained a preliminary ruling procedure, that procedure was reserved to the UPC, without the national courts holding any ancillary competence to refer such questions.[90] Second, there was no means of holding the signatory Member States accountable if the UPC did not comply with EU law, nor of attributing financial liability to the former.[91]

In response, the UPCA contains a plethora of commitments by the Member States. Thus, the UPC 'shall apply Union law in its entirety and respect its primary' (Article 20 thereof) (Article 24(1) of the same agreement specifying EU law as an express source of law); the UPC must 'cooperate' with the CJEU, as if it were a national court, 'in accordance with Article 267 TFEU in particular'; and that decisions of the CJEU be binding upon it (Article 21); and any damage resulting from an infringement of Union law by its Court of Appeal is not only attributable to the signatory Member States individually and collectively (for the purposes of Articles 258 to 260 TFEU) (Article 23 of the UPCA), but the Member States also assume joint and several liability any resulting damage (Article 22 of that agreement). Without it being necessary to enter into further discussion of those requirements, it suffices to say that a proposal for an intra-EU investment court, if established

Auditors may apply EU law a sufficient link to require the satisfaction of the requirement for effective judicial protection, as flowing from Article 19(1) TEU). Along the same lines, CJEU, cases C-585/18, C-624/18 and C-625/18, *A.K. and Others v. Sąd Najwyższy, CP v. Sąd Najwyższy and DO v. Sąd Najwyższy*, ECLI:EU:C:2019:982, para. 83.

88 Opinion 1/17 of the Court, EU-Canada CET Agreement, ECLI:EU:C:2019:341, para. 134 (noting that the ECJ's involvement is not necessary if the powers of interpretation of the CETA Tribunal and Appellate Tribunal are confined to the provisions of the CETA).

89 Such 'fork-in-the-road' types of settlement have been upheld by the ECJ to satisfy the principles of Article 267 TFEU (see, for instance, CJEU, case 109/88, *Handels- og Kontorfunktionærernes Forbund i Danmark*, ECLI:EU:C:1989:383, para. 7 (relating to proceedings between the parties to collective agreements and their employers before an industrial arbitration board, whose jurisdiction was established by law); and CJEU, case C-203/14, *Consorci Sanitari del Maresme v. Corporació de Salut del Maresme i la Selva*, ECLI:EU:C:2015:664, paras 22 to 25 and the case-law cited (finding recourse to the administrative courts at second instance sufficient to ensure that EU public procurement law is observed).

90 Opinion 1/09 of the court, Agreement creating a Unified Patent Litigation System, ECLI:EU:C:2011:123, para. 79 (explaining that the draft PC 'takes the place of national courts and tribunals … [and] deprives, therefore, those courts and tribunals of the power to request preliminary rulings from the Court in that field').

91 Ibid, paras 86 to 88 (observing that, under EU law, the Member States must make good damage caused as a result of breaches thereof by their national courts, and even hold them financially liable; however, neither of those safeguards would exist under the draft agreement).

within the judicial structure of the Member States and tasked with (partial or exclusive) jurisdiction over intra-EU investment disputes, would have to satisfy those requirements in like measure.

Besides those pointers, there are two additional factors, not explored in Opinion 1/09 (*Agreement creating a Unified Patent Litigation System*) given the type of dispute settlement system created by the UPCA, which will flow into the assessment of the creation of an intra-EU investment court.

The first additional element is that of accessibility of the entire system. In its current design, investor-State dispute settlement is expensive.[92] Therefore, depending on the institutional, staffing, and funding structure of an intra-EU investment court, as well as cost and damages arrangements for ensuring proceedings, the right to an effective remedy enshrined in Article 47 of the Charter may require certain arrangements to enable natural persons or a small and medium-sized enterprise to bring proceedings. When discussing that issue in Opinion 1/17 (*EU-Canada CET Agreement*), the ECJ noted that, indeed, the 'extent of the financial risk undertaken by bringing proceedings' may act as a deterrence to bring a case for such parties,[93] and thereby also undermine the guarantee of accessibility of a court or tribunal under the right to an effective remedy.[94] Accordingly, and again subject to the institutional and procedural structure of the resulting court, it would appear necessary, pursuant to the overall requirement to ensure the full application of EU law, to take guidance of the commitment, by the Union, of guaranteeing access to the CETA Tribunal, once it is established in the flesh.[95]

The second additional element is that of independence. In the general framework of its task of judging, independent decision-making is one of the core elements of a 'court or tribunal'.[96] It gains particular importance where a system of dispute settlement is set up to function as the sole and exclusive venue for a particular type of cases.[97] Independence has both 'internal' and 'external'

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92 Recall, for instance, that a 2021 empirical study by the British Institute of International and Comparative Law and Allen & Overy, titled 'Costs, Damages and Duration in Investor-State Arbitration', available at: https://www.allenovery.com/en-gb/global/news-and-insights/publications/costs-damages-and-duration-in-investor-state-arbitration (24/10/2022) p. 4, found that, for 'respondent States, the mean costs incurred in an ISDS proceeding are around US$4.7 million … [while] [t]he median figure is US$2.6m', whereas '[f]or investors, the mean costs exceed US$6.4m … [while] [t]he median figure is US$3.8m.'

93 Opinion 1/17 of the Court, EU-Canada CET Agreement, ECLI:EU:C:2019:341, para. 211 (explaining that the design of the CETA Tribunal is such that the claimant investor may have to carry the fees and expenses of the Member of the Tribunal, so that, in particular for natural and small and medium-sized legal persons, there may be an inherent deterrence in filing investment claims).

94 Ibid, para. 201 (referring to the guarantee of accessibility as 'the very essence of the right of access to such a tribunal', although that right may involve proportionate restrictions).

95 Ibid, para. 221 (referring to the commitment, further outline in Statement No 36 by the Commission and the Council, that 'the Commission is committed to further review, without delay, of the dispute settlement mechanism … allowing sufficient time so that Member States can consider it in their ratification processes'). That statement is included in Statements to be entered in the Council minutes (OJ L 11 of 14/01/2017, p. 20).

96 See, in particular, CJEU, cases C-585/18, C-624/18 and C-625/18, *A.K. and Others v. Sąd Najwyższy, CP v. Sąd Najwyższy and DO v. Sąd Najwyższy*, ECLI:EU:C:2019:982, paras 127 and 153 and the case-law cited (referring to the 'appearance of independence' as a relevant standard under Article 6(1) ECHR and referring to the possibility of doubts 'in the minds of the subjects of the law' as to the imperviousness of a court or tribunal as being the relevant standard under Article 267 TFEU).

97 See, in particular, CJEU, joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, *Euro Box Promotion and Others*, ECLI:EU:C:2021:1034, para. 224 (explaining that requires that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions').

aspects.[98] The former aspect is linked to impartiality and the appearance of independence.[99] The latter aspect of independence protects the autonomous exercise of the functions of a court or tribunal, requiring the lack of any hierarchical control by, or subordination to, any internal or external source.[100] As the ECJ in Opinion 1/17 (*EU-Canada CET Agreement*) explained, those guarantees 'require rules, particularly as regards the composition of the body and the appointment, length of service and grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it'[101].

To the extent that an intra-EU investment court would be designed to fit within the EU judicial structure, as a court 'common' to the Member States, be that with sole and exclusive or shared jurisdiction, the importance of the criterion of independence of a court or tribunal arises essentially from three (separate yet analogous) angles. The first angle, subsumed within Article 19(1) TEU, concerns the systemic and structural design of the system of dispute settlement intended to apply EU law.[102] The second angle takes an individual rights-centred approach and is protected from the perspective of Article 47 of the Charter.[103] The third angle links specifically to the preliminary reference procedure under Article 267 TFEU, and relates to the question of admissibility of a question referred to the ECJ ('can I talk to this body at all?').[104] While the conditions for independence overlap for all of those angles,[105] given that Articles 19(1) TEU, 47 Charter and 267 TFEU all tackle different aspects of the EU judicial architecture, all three of those angles will have

98 See, in particular, CJEU, case C-506/04, *Graham J. Wilson v. Ordre des avocats du barreau de Luxembourg*, ECLI:EU:C:2006:587, paras 49 to 52 (recognising for the first time that the concept of independence, which is inherent in the task of adjudication, has three distinct aspects: that the body must stand as a third party to the dispute; that it is 'externally' independent; and that it is 'internally' independent).

99 See, for instance, CJEU, case C-192/18, *European Commission v. Republic of Poland*, ECLI:EU:C:2019:924, para. 110 and the case-law cited (explaining that the aspect of impartiality, 'seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law').

100 See, to that effect, Opinion 1/17 of the Court, EU-Canada CET Agreement, ECLI:EU:C:2019:341, para. 90 (finding that because the 'CETA Tribunal is not a court that has compulsory jurisdiction, since an investor may submit a dispute either before an ordinary court or before that Tribunal. It follows that the requirement of independence does not apply to that Tribunal in the same way as it does to an ordinary court or tribunal').

101 Ibid, para. 204.

102 See, in particular, the wording in the second subparagraph of Article 19(1) TEU, referring to the obligation on Member States to 'provide remedies sufficient to ensure effective legal protection in the fields covered by EU law'.

103 See, in this regard, the language of Article 47 of the Charter, which protects the right to an effective remedy and a fair trial, and which refers to the entitlement to a fair and public hearing 'by an independent and impartial tribunal previously established by law'.

104 The text of Article 267 TFEU does not specifically refer to the concept of independence of a 'court or tribunal'. However, that connection was established already in the early case-law of the ECJ in case 61/65, *G. Vaassen-Göbbels (a widow) v. Management of the Beambtenfonds voor het Mijnbedrijf*, ECLI:EU:C:1966:39, p. 273 (introducing the essential characteristics of what can be considered a 'court or tribunal' of (what is now) Article 267 TFEU).

105 See Opinion of Advocate General Bobek in Joined Cases C-748/19 to C-754/19, *Prokuratura Rejonowa w Mińsku Mazowieckim and Others*, ECLI:EU:C:2021:403, point 161 et seq (arguing that there is only one EU law principle of independence, which is addressed from different angles). That being said, the ECJ appears to have taken a softer approach as regards Article 267 TFEU; see, for instance, CJEU, case C-103/97, *Josef Köllensperger GmbH & Co. KG and Atzwanger AG v. Gemeindeverband Bezirkskrankenhaus Schwaz*, ECLI:EU:C:1999:52, paras 19 to 24 (finding that even though the condition of external independence appears not satisfied, jurisdiction under Article 267 TFEU can nonetheless be asserted, since it is 'not for the Court to infer that such a provision [of national law] is applied in a manner contrary to the Austria's constitution and the principles of a State governed by the rule of law').

to be satisfied for the resulting system of dispute settlement to be a 'mechanism capable of ensuring the full effectiveness of the rules of the European Union'[106].

II. Legal basis

Supposing the above framework would be acceptable for the design of an intra-EU investment court, the next question to turn to is the legal basis for that arrangement. In contrast with the UPCA, no singular legal basis of the Treaties provides for a hook as neatly designed as Article 118 TFEU. That provision specifically explains that, '[i]n the context of the establishment and functioning of the internal market, … [the EU legislator] shall establish measures for the creation of European intellectual property rights to provide uniform protection … [thereof] throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.' However, although foreign direct investment falls within Article 207 TFEU, and thus the common commercial policy,[107] the free movement of capital falls within the Internal Market arena.[108]

That implies recourse to two possibilities. If remaining within the Treaty framework, the EU legislator could resort to like integration through the fall-back legal basis contained in Article 114 TFEU. Alternatively, a limited number of Member States could resort to 'enhanced cooperation', as laid down in Article 20 TEU, particularly where there appears that no uniform line can be reached. Naturally, a detailed discussion of the limits of either procedure escapes the scope of this contribution. However, for the purposes of completeness, both options will be discussed briefly.

First, on Article 114 TFEU. That provision appears the most likely legal basis for a self-standing intra-EU investment court given that it acts to achieve the aim expressed by Article 26 TFEU: a functioning internal market, including in the free movement of capital. It thus is in particular aimed at removing divergences between the laws of the Member States.[109] In its 2020 Inception Impact Assessment, the Commission appears to hint precisely at that issue, and thus the likely use of Article 114 TFEU, when it explains that '[d]iverging levels of investment protection in the different Member States may have a negative impact on the free movement of capital and investment flows in the internal market' and that therefore '[m]easures taken at EU level can ensure more consistent protection across Member States, thereby improving he functioning of the internal market[.]'[110] While those explanations, in themselves, may not satisfy the burden for proving a need for recourse to Article 114 TFEU, for all effects and purposes, it appears feasible that that provision could act as a legal basis for any EU law measure establishing an intra-EU investment court.

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106 See Opinion 1/09 of the court, Agreement creating a Unified Patent Litigation System, ECLI:EU:C:2011:123, para. 82 (explaining that a system of dispute settlement common to the Member States must ensure 'the full effectiveness' of EU law).

107 See, in this regard, Opinion 2/15 of the Court, EU-Singapore Free Trade Agreement, ECLI:EU:C:2017:376, paras 80, 81, 109 and 110 (defining (foreign) direct investment as 'investments of any kind made by natural or legal persons which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity', and thus finding the Union competent to approve that part of the EU-Singapore agreement itself).

108 See Article 26(2) TFEU (listing the free movement of capital among those elements which constitute the Internal Market). The free movement of capital is then contained in Articles 63 *et seq.* TFEU.

109 See, for instance, CJEU, case C-300/89, *Commission of the European Communities v. Council of the European Communities*, ECLI:EU:C:1991:244, paras 15 and 23 (explaining that Article 114 TFEU can be used to harmonize measures to 'deal with disparities between the laws of the Member States', and thereby may distort competition within the Internal Market).

110 Inception Impact Assessment, p. 3.

Second, 'enhanced cooperation', within the meaning of Article 20 TEU. That procedure is essentially a way of advancing the interest and integration of the Union where the objectives of such integration cannot be attained by the Union itself. That may be necessary especially in areas where diverging views on the direction or content of a Union initiative would otherwise not be bridged in the foreseeable future.[111] The UPCA is one example of such enhanced cooperation. There, recourse to Article 20 TEU was made given that there remained 'insurmountable difficulties' as regards translation arrangements for that agreement.[112] However, the conditions for enhanced cooperation are strict and thus not a 'carte blanche' to use the EU legal and institutional framework to push integration in one or more directions. Above all, the Council must conclude 'that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole'.[113] In response, it must grant a sufficiently clear and specific authorisation regarding the radius of action.[114] The implementation of said authorization is then subject to a number of conditions.[115]

For the purposes of the present discussion, it is neither necessary nor feasible to enter into all of those requirements. There are simply too many variables under the enhanced cooperation procedure. However, it appears as if one of the foundational pillars for recourse to that procedure is satisfied: the presence of a competence shared between the Member States and the Union, the objective of which could be advanced through further integration by means of a common system dispute settlement. Putting aside for now the fact that, at the external plane, the ECJ has deemed investor-State dispute settlement a shared competence,[116] it is only logical that if the Union and the Member States share the competence to regulate the substantive parts of free movement of capital, then it must follow that the *means* of achieving that objective are likewise covered by the same

111 See, for instance, Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax, OJ L 22 of 25/01/2013, p. 11, recital 5 (explaining that the 'persistent and essential differences in opinion as regards the need to establish a common system of [financial transaction tax] at the Union level … will not receive unanimous support within the Council in the foreseeable future').

112 See Council Decision 2011/167/EU of 10 March 2011 authorising enhanced cooperation in the area of the creation of unitary patent protection, OJ 2011 L 76, p. 53, recital 4 (explaining that, at a Council meeting, 'it was recorded that there was no unanimity to go ahead with the proposed Regulation on the translation arrangements' and that thus 'insurmountable difficulties existed, making unanimity impossible at the time and in the foreseeable future').

113 Article 20(2) TEU.

114 The latter requirement does not arise from the Treaties but is mentioned by *Kellerbauer* as one of the defining features of such an authorization. See, in this regard, Kellerbauer, Article 20 TEU, in: Kellerbauer/Klamert/Tomkin (eds.), p. 193. Note also that, in the decision granting said authorization, the Council need not provide further information with regard to the possible content of the system by the participants in the enhanced cooperation in question; see CJEU, cases C-274/11 and C-295/11, *Kingdom of Spain and Italian Republic v. Council of the European Union*, ECLI:EU:C:2013:240, para. 92.

115 Those are as follows. First, that the cooperation remains within the scope of the authorization (see, to that effect, Article 329(1) TFEU); second, that it stays within the Union's non-exclusive competence (see Article 20(1), first subparagraph, TEU); third, that it 'aim[s] to further the objectives of the Union, protect its interests and reinforce the integration process' (Article 20(1), second subparagraph, TEU); fourth, that it complies with EU law (see the first paragraph of Article 326 TFEU); fifth, that it does not 'damage … the internal market and discriminat[e] and distort[] … competition' (see CJEU, cases C-274/11 and C-295/11, *Kingdom of Spain and Italian Republic v. Council of the European Union*, ECLI:EU:C:2013:240, para. 76) subscribing the more lengthy wording of the second paragraph contained in the second paragraph of Article 326 TFEU; sixth, that it respects 'the competences, rights and obligations of non-participating Member States' (see Article 327 TFEU); and seventh, that it remains open to all Member States (see Article 328(1) TFEU).

116 See, in this regard, Opinion 2/15 of the Court, EU-Singapore Free Trade Agreement, ECLI:EU:C:2017:376, paras 276 and 292 to 293) (finding an investor-State dispute settlement system in an EU agreement of such a nature as to require joint conclusion).

competence. After all, the latter is merely accessory in the achievement of the former.[117] Furthermore, as the Commission explained in its Inception Impact Assessment, intra-EU 'investors … can be confronted with difficulties in enforcement their rights and obtaining a remedy'.[118] As such, an intra-EU investment court, aimed at improving the enforcement of investment rules would assist in deeper integration of the Capital Markets Union, and thus satisfy the overall objective of resorting to enhanced cooperation in the first place.

D. A 'compromis' to confer jurisdiction on an 'third' body

The second 'outside' possibility of regulating dispute settlement in the intra-EU sphere would be to resort to a 'compromis'[119] between the Member States to 'dock' the resolution of intra-EU investment disputes to a body or institution that does not form part of the Treaties. That policy idea, too, was raised in the 2016 Non-Paper. Thusly, the Member States would provisionally decide, by means of an international agreement, on a 'compromis' dedicated to intra-EU investment disputes, allocating those disputes to a particular forum.[120] The PCA, as established institution for the settlement of international disputes was considered the most appropriate addressee of such a 'compromis'. That institution would then be tasked with the resolution of those disputes as well as to 'directly address requests for preliminary rulings to the ECJ'.[121]

The compatibility of that approach is easily discarded. Generally speaking, Article 344 TFEU prevents the Member States from agreeing to a method of dispute settlement 'other than those provided for' in the Treaties.[122] That includes assignments by means of ad hoc or standing 'compromis' (the most famous of the latter type of assignment being the Dispute Settlement Understanding of the WTO Agreement), if the area of dispute settlement falls within the scope of the Treaties.[123] For that 'Article 344 TFEU prohibition' to be triggered, what is required is that 'a

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117 See, by analogy, Opinion 2/15 of the Court, EU-Singapore Free Trade Agreement, ECLI:EU:C:2017:376, para. 505 and the case-law cited) (explaining that where the Union holds the competence as regards the substantive provisions of an international agreement that it also enjoys the competence as regards its dispute settlement).

118 Inception Impact Assessment, p. 2.

119 Within the meaning of Article 52 of the 1907 Convention for the Pacific Settlement of International Disputes (UKTS 6 (1971) Cmnd. 4575).

120 See, in particular, *General Secretariat of the Council of the European Union* (Trade Policy Committee), Intra-EU Investment Treaties Non-paper from Austria, Finland, France, Germany and the Netherlands, point 13, which explains that '[t]he Delegations are however of the view that a permanent court system, either through the ECJ or a specific mechanism modeled on the Unified Patent Court, would in principle be more in line with the EU's new trade policy on investor-to-State dispute settlement and should therefore be envisaged as a longer term perspective. Accordingly, the "Compromis" relying on the PCA, as envisaged above, could be a provisional scheme that would be subsequently replaced by a permanent solution for investment disputes within the internal market'.

121 Ibid, point 14.

122 Although there is disagreement on whether an assignment of disputes not directly concerning the interpretation and application of the Treaties (which is the language of Article 344 TFEU), but merely relating to their 'subject matter' (referred to as the baseline for Article 273 TFEU to apply) is compatible with that general prohibition of Article 344 TFEU. To that effect, see Opinion of Advocate General Mengozzi in case C-648/15, *Republic of Austria v. Federal Republic of Germany*, ECLI:EU:C:2017:311, points 41 to 42 (arguing that Article 273 TFEU permits, 'on the basis of a special agreement, the extension of the Court's jurisdiction to disputes which relate not to EU law … but to international law, provided that the area of international law in question relates to the subject matter of the Treaties').

123 In fact, it appears that the ECJ has gone so far as finding that, upon accession to the Union, the Member States parted with their international law competence to agree to a 'compromis' incompatible with the judicial framework of Article 19(1) TEU. See, by analogy, CJEU, case C-638/19 P, *European Commission v. European Food*

significant part' of the dispute relates to the interpretation or application of EU law.[124] That being said, in the light of the case-law in *Achmea*, it could even be argued that the mere *potential* of a 'significant part' of the dispute relating to EU law could trigger Article 344 TFEU.[125] A low bar, in other words. Given that the resolution of intra-EU investment claims almost certainly raises questions of EU law (see page 18 above), it would appear that Article 344 TFEU prevents any assignment, by means of 'compromis', of intra-EU investment disputes for exclusive resolution by the PCA.

Need that be the end of the line? Possibly not. What if one were to return to the possibility of designating the PCA or a like tribunal as a specialized 'common' court tasked by (some of) the Member States with the resolution of intra-EU investment disputes? It is at least arguable that such a consideration would paint a more favourable picture. Thus, the Member States could simply enter into such a 'compromis', with the added twist that they designate, at the same time, under that agreement and their national laws, the PCA as 'common' between them for the purposes of a specific class of classes (i.e. intra-EU investment disputes). Legally, that approach would not be much different than that adopted for the remodelled UPC (see page 16 above above). Thereby, the PCA would become the exclusive (or parallel) jurisdiction for intra-EU investment disputes. Granted, the conditions discussed in pages 14 to 22 of this contribution would also have to be satisfied for that type of system to fit neatly into the EU judicial system. In other words, one returns to the discussion surrounding the qualitative conditions for commonality, and their limits. As discussed, those are yet to be further explored in the case-law of the Court, even if can be argued that the Member States should hold quite some discretion in the design of such a system. The bottom line, however, is that, legally, the 'docking' intra-EU investment disputes to the PCA does not appear precluded if that court is sufficiently 'common' between the (participating) Member States. And yet, whether that idea represents a politically-feasible alternative in the first place is an entirely different question, possibly to be resolved during those famous late night meetings at Council level.

E. Conclusion

In theory, *Achmea* marked the end to the dubious temples of intra-EU investment arbitration. In practice, the underlying grievances remain.[126] The resulting silence on how to resolve that impasse is deafening, not least given that national time limits may, on the face of it, appear to preclude access to national courts, even if investors sought protection otherwise.[127] What to do then? In line

SA and Others, ECLI:EU:C:2022:50, para. 139 (finding that 'with effect from Romania's accession to the European Union, the system of judicial remedies provided for by the EU and FEU Treaties replaced that arbitration procedure, the consent given to that effect by Romania, from that time onwards, lacked any force').

124 CJEU, case C-459/03, *Commission of the European Communities v. Ireland*, ECLI:EU:C:2006:345, para. 135.

125 See the references in footnote 57 above.

126 As is also evidenced by the sheer number of arbitral tribunals which declined to accept the intra-EU objection lodged by the Commission and (most) 'home' Member States of the EU investor at issue. See, *ex multis*, the recent decision of 19 August 2022 on Spain's second request for reconsideration of the 'intra-EU objection' in *Infracapital F1 S.à r.l. and Infracapital Solar B.V v. Kingdom of Spain* (ICSID Case No. ARB/16/18).

127 Although, as is clear from the case-law of the ECJ, national procedural provisions must give way to the principle of effectiveness of EU law, and thus access to effective judicial protection. See, by analogy, CJEU, case C-869/19, *L v. Unicaja Banco SA*, ECLI:EU:C:2022:397, paras 37 to 39 (finding that, even where a consumer did not bring proceedings in time against an unfair contractual term, barring such claims later on by reason of national time limits render the protection of EU-law-based rights impossible or excessively difficult, and thereby undermine the principle of effectiveness). See also Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union, OJ L 169 of 29/05/2020, p. 1 ('Intra-EU Termination Agreement'), Article 10, where the same principle is specified.

with the mantra '*est maître des lieux celui qui les organise*', the Communication on the protection of intra-EU investment[128] and the Intra-EU Termination Agreement,[129] both issued in the wake of *Achmea,* certainly gaze at the functional continuity of (intra-EU) investment disputes under the umbrella of an EU law-compatible system of dispute settlement. However, how such continuity could be achieved remains essentially unexplored.

This contribution has sought to show that there is little reason why that should remain the case. Like Dürer's woodcut, the 2016 Non-Paper stands as a strong preliminary outline of how the institutional future of intra-EU investment could look like. Of those options, a self-standing intra-EU investment court, akin to that pursued by the UPCA appears a (legally) feasible and an institutionally attractive option, both for investors and the Member States, for the future of intra-EU investment disputes.[130] However, as has also been explained, under the current state of the case-law, it even appears possible that such a self-standing dispute settlement body may be established by 'docking' intra-EU investment disputes onto an existing institution outside the EU judicial system, like the PCA, if the conditions of 'commonality' of such a court (arising originally from *Parfums Christian Dior*) are satisfied. The resulting system would also address (real or presumed) concerns of 'domestic court bias'. It would equally lay to rest those voices that deem the case-law of the CJEU too rigid to allow for 'new' modes of dispute settlement.

One loose end remains. After the above discussion, the reader will be curious to know what happened to the rhinoceros, which Dürer famously depicted. In 1515, King Manuel I of Portugal graciously decided to send it on as a gift to Pope Leo X. The animal drowned when the boat it was travelling in sunk en route.

128 Communication from the Commission to the European Parliament and the Council, Protection of Intra-EU investment (COM/2018/547 final) ('Communication on the Protection of Intra-EU Investment'), p. 28: 'The Commission strives to increase the effectiveness of the enforcement system in the EU, including actions to support administrative capacity building or to strengthen justice systems, and to tackle breaches of EU law by national authorities'.

129 Intra-EU Termination Agreement (referring, inter alia, to the ECOFIN Council conclusions of 11 July 2017, and the need to 'intensify discussions without undue delay with the aim of better ensuring complete, strong and effective protection of investments within the European Union … [including] the assessment of existing processes and mechanisms of dispute resolution as well as the need and, if the need is ascertained, the means to create new or improve relevant existing tools and mechanisms under Union law').

130 And yet, as Austria, Finland, France, Germany and the Netherlands themselves conclude in relation to such a court, 'this option, while providing for the technically most well-rounded solution, would however most probably not be reached within a reasonable timeframe.' See, *General Secretariat of the Council of the European Union* (Trade Policy Committee), Intra-EU Investment Treaties Non-paper from Austria, Finland, France, Germany and the Netherlands, point 12.

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