

# Intra-EU Investment Treaties and EU Law

## Inaugural Conference of EFILA

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# Three selected arguments from an EU law perspective

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- Article 18 TFEU:

*"Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."*

- Article 344 TFEU:

*"Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."*

- Article 267 TFEU: Autonomy of EU legal order

# Article 18 TFEU: Non-discrimination

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- Access to investor-State arbitration: preferential treatment?
- Extension of preferential treatment to all investors from all EU Member States?
- Is EU law opposed to the "outsourcing" of disputes involving EU law to arbitral tribunals outside of the EU legal order?

# Article 344 TFEU: Offer to arbitrate no longer valid

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- ECJ, *MOX Plant* (Case C-459/03), para. 177:

*"The act of submitting a dispute of this nature to a judicial forum such as the Arbitral Tribunal involved the risk that a judicial forum other than the Court will rule on the scope of obligations imposed on the Member States pursuant to [Union] law."*

- ECJ, *MOX Plant* (Case C-459/03), para. 123:

*"An international agreement cannot affect the allocation of responsibilities defined in the Treaties and consequently the autonomy of the [Union] legal system [...]."*

# Article 344 TFEU: Offer to arbitrate no longer valid

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- Article 8(2) of the Netherlands-Slovak Republic BIT:

*"Each Contracting Party hereby consents to submit a dispute [...] to an arbitral tribunal [...]."*

- Is an offer to arbitrate disputes by an EU Member State valid in the light of Article 344 TFEU?
- If the offer to arbitrate disputes were valid, a Member State might have to be found to be in breach of its obligation to secure the uniform application of EU law.
- If there is no valid offer to arbitrate, then the investor cannot perfect the arbitration agreement.

# Article 267 TFEU: Autonomy of EU legal order

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- An arbitral tribunal may not request a preliminary ruling from the CJEU because it is not a "*court or tribunal of a Member State*" within the meaning of Article 267 TFEU.
- Article 267 TFEU aims to ensure that EU law has the same effect in all Member States.
- The Tribunal in *Achmea v Slovak Republic* arguably misjudged the scope of the autonomy of the EU legal order when it said (para. 283):

*"The fact that, at the merits stage, the Tribunal might have to consider and apply provisions of EU law does not deprive the Tribunal of jurisdiction."*

# Article 267 TFEU: Autonomy of EU legal order

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- CJEU, Opinion 1/09, para. 80:

*"the Member States cannot confer the jurisdiction to resolve [...] disputes on a court created by an international agreement which would deprive those courts of their task, as 'ordinary' courts within the European Union legal order, to implement EU law, and, thereby, of the power provided for in Article 267 TFEU."*

- CJEU, Opinion 1/09, para. 85:

*"It follows from the foregoing that the tasks attributed to the national courts and to the Court of Justice respectively are indispensable to the preservation of the very nature of the law established by the Treaties."*

# Conclusion

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- *Electrabel v Hungary*, Decision on Jurisdiction, Applicable Law and Liability, para. 4.191:

*"In summary, from whatever perspective the relationship between the ECT and EU law is examined, the Tribunal concludes that EU law would prevail over the ECT in case of any material inconsistency. That conclusion depends, however, upon the existence of a material inconsistency;"*

- The view of the CJEU?



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