BITs and Pieces of Investor-State Dispute Settlement in Europe

Investor-State Dispute Settlement in Bilateral Investment Treaties in Europe and the relationship with EU/EEA courts and tribunals, from a Norwegian perspective

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# Table of Contents

## 1 INTRODUCTION

1.1 Topic and research question ................................................................. 1  
1.2 Definitions ......................................................................................... 2  
1.3 Limitations on scope ......................................................................... 3  
1.4 Methodology ..................................................................................... 4  
1.5 Outline and structure ....................................................................... 4  

## 2 THE OBJECT, PURPOSE AND FUNCTIONING OF INTRA-EUROPEAN BITS

2.1 Investment Arbitration in Europe ......................................................... 5  
2.2 Relevant differences between the EU and EEA frameworks for an international investment law setting .......................................................... 8  

## 3 THE ROLE OF EU/EEA LAW IN INVESTMENT ARBITRATION

3.1 Public international law perspective on EU law .................................... 11  
3.2 Domestic law perspective on EU law .................................................. 12  
3.3 The “sui generis” perspective on EU law .............................................. 13  
3.4 Is there one “right” perspective to look at EU law from? ...................... 14  
3.5 The EEA legal framework in a European investment law setting .......... 17  

## 4 THREATENED SUPREMACY AND EXCLUSIVITY? INVESTOR STATE DISPUTE SETTLEMENT FOR EUROPEAN STATES

4.1 Supremacy challenges in a EU setting .................................................. 19  
4.1.1 Lack of recourse to preliminary references to the CJEU pursuant to Article 267 TFEU ............................................................................... 20  
4.1.2 Dichotomy between review of ICSID and non-ICSID awards in relation to implications for compatibility with EU adjudication ....................... 24  
4.1.3 Is an ISDS case a dispute submitted by a Member State within the meaning of Article 344 TFEU? ................................................................. 26  
4.1.4 Article 19(1) TEU: Resolving EU disputes without the CJEU’s last word..... 29  
4.1.5 Conclusions on the potential incompatibility with Articles 267 and 344 TFEU and Article 19(1) TEU ............................................................... 31  
4.2 Supremacy challenges in an EEA framework from a Norwegian perspective .... 33  
4.2.1 International investment law in Norway ............................................ 33
4.2.2 Advisory opinions to the EFTA Court and uniform interpretation of the EEA Agreement ................................................................. 34
4.2.3 Supremacy challenges in regards to the Norwegian constitution .......... 36

5 IDEAS FOR AN EVER CLOSER UNION: SUGGESTIONS FOR RESOLVING THE PROCEDURAL CHALLENGES OF ISDS IN EUROPE .............. 40
5.1 The EU perspective ........................................................................ 40
5.2 The Norwegian perspective ................................................................. 41

6 CONCLUDING REMARKS ................................................................................................................................. 42

7 LIST OF AUTHORITIES ........................................................................................................................................ 45
7.1 Books ............................................................................................................. 45
7.2 Articles ............................................................................................................. 45
7.3 Miscellaneous ................................................................................................. 47

8 LIST OF LEGAL SOURCES .................................................................................................................................. 50
8.1 Laws, Directives and Regulations: ............................................................ 50
8.2 Treaties ............................................................................................................. 51
8.3 Arbitral Decisions ......................................................................................... 53
8.4 European Court of Justice cases ............................................................... 54
8.5 EFTA Court cases ......................................................................................... 55
8.6 Other Court Cases, Decisions and Opinions ............................................. 55
8.7 Miscellaneous ................................................................................................. 55
1 Introduction

1.1 Topic and research question

In 1991 two Swedish brothers, Ioan and Viorel Micula, made multiple foreign direct investments ("FDIs") in Romania. The investments spanned over the next two decades and grew alongside Romania's transition from a former Soviet Union economy to a market-based economy\(^1\) with a policy for the promotion of disfavored regions that sought to attract both foreign and domestic investment.\(^2\) One approach to attracting investment was to engage in bilateral investment treaties ("BIT") designed to promote and protect FDI. As part of its transition, Romania became a member of the European Union\(^3\) ("the EU") in 2007. The evolution to an EU Member State involved changes in its investment policies that the Micula brothers claimed were detrimental to their investments.\(^4\) As a consequence, the brothers filed a request for arbitration against Romania pursuant to the Romania-Sweden BIT claiming compensation. The Romania-Sweden BIT includes an arbitration clause that allows for investor-state dispute settlement ("ISDS"). Romania contended that it had implemented the disputed measures because of its EU accession.\(^5\) As a result of the arbitration, the Micula brothers were awarded a sum equivalent to 84,000,000 EUR in December 2013.\(^6\)

In other words, Romania found itself between a rock and a hard place, EU law and public international law. The possible incompatibility with the EU/European Economic Area ("EEA") internal market is apparent. On their face, BITs are based on a premise of bilateral privilege, while the internal market's purpose is to "work for the sustainable development of Europe" as a whole and "promote economic, social and territorial cohesion, and solidarity among Member States."\(^7\) This is equally true in relation to the EEA Agreement.\(^8\) The multifaceted character of the Micula dispute illustrates the complexity of balancing these different sets of law when adjudicating disputes flowing from a BIT between two EU Member States ("intra-EU BIT"). Would the same challenges arise in a comparable EEA situation?

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\(^1\) *Micula v. Romania*, Final Award, para 133

\(^2\) Ibid., paras 137-155

\(^3\) Ibid., para 137

\(^4\) Ibid., para 161

\(^5\) Ibid., para 315

\(^6\) Ibid., para 1329; The dispute did not end with the final award, as the European Commission has stated that any payment of the award would be in violation of EU state aid rules. In February 2016, Romania failed in its attempt to annul the award. Currently, the Micula brothers endeavor to enforce the award in several European countries as well as in the United States. See *Micula v. Romania*, Decision on Annulment, paras 323, 324, and 239.

\(^7\) Article 3(3) of the Treaty on European Union ("TEU")

\(^8\) EEA Agreement Articles 1 and 4, which include the European Free Trade Agreement ("EFTA") states in the internal market, and prohibit discrimination on grounds of nationality.
The topic of this thesis is the procedural matters connected to intra-European ISDS. There are at least two perspectives to this topic: One is how ISDS fits into the EU/EEA legal framework, and another is how an investment treaty arbitral tribunal approaches and deals with EU/EEA law. This thesis will deal first with the latter perspective. The main focus of this thesis will be from the former perspective.

The research question of this thesis is if, and in case to what extent there are incompatibilities between the dispute resolution processes offered under an intra-European BIT and by the ordinary courts in Europe. The analysis will be focused on possible incompatibilities with the right to interpret EU/EEA law, and on the forum for dispute settlement in disputes regarding EU/EEA law and an EU/EEA state. I will compare the situation in the EU with the EEA situation from a Norwegian perspective. The purpose is to form a hypothesis on where intra-EU BITs are headed based on previous experiences and case law, limited to implications following any incompatibility with procedural rights. I will analyze in which direction Norwegian BITs should go in light of the EU’s experiences.

1.2 Definitions
There is not one common definition of FDI that is widely used. The European Commission ("Commission") has defined FDI as "any foreign investment which serves to establish lasting and direct links with the undertaking to which capital is made available in order to carry out an economic activity." Most BITs define investments as different forms of assets of economic value. Moreover, the scope of the BITs is often limited by a definition of the terms "investment" and "investor." The investor has to have the nationality of the other contracting state to the BIT to enjoy its protections. Since these definitions are cited in the BITs themselves, there are nuances and differences.

These treaties have spearheaded the rise of a different type of arbitration than arbitration between two private parties: arbitration between one private investor and one state. While the
former is often referred to as commercial arbitration, arbitration between one state and one private investor is referred to as investment treaty arbitration or ISDS, which is the topic of this thesis. ISDS is the dispute resolution system that very often is a central feature of BITs. It is a system characterized by its fragmented and varied substantive legal basis, that it allows private parties to enforce its rights against a State in arbitration, and that the institution is otherwise based on many of the same features as commercial arbitration.\footnote{OECD Investor-State Dispute Settlement Public Consultation (2012), p. 8} The most essential of these features includes \textit{ad hoc} basis, "party appointed arbitration panels, emphasis on speed and finality of finding."\footnote{Ibid., p. 8} 

1.3 Limitations on scope

Even when limiting the scope of the thesis to BITs within Europe, there are ample questions that could warrant whole theses of their own. This thesis will limit its scope to the procedural rights provided to the investors under intra-EU BITs and intra-European BITs, and the relevant EU/EEA and Norwegian legal framework for analyzing possible incompatibilities between the different sets of adjudication rules. The thesis will not assess the legality of intra-EU BITs as such, or whether such treaties should be terminated.

A non-exhaustive list of interesting questions that fall outside of the scope of this thesis includes the external relations of the EU and its common commercial policy, BITs with non-European countries and BITs with one European country and one third-country ("extra-EU BITs"),\footnote{Although this thesis will consider BITs between Norway and EU Member States, which are also extra-EU BITs} issues connected to the substantive standards of investment protection in a typical BIT, and questions focused on commercial arbitration. This thesis will not consider state-state disputes that are often part of BITs, nor will it delve into the question of whether there are material differences between the standards of protections offered by an intra-EU BIT and EU provisions.

There are many arbitral awards rendered between European countries under the Energy Charter Treaty (the "ECT"). Many of the questions pertaining to the incompatibility of arbitration in the European legal framework apply equally to ECT cases as to BIT cases. While the focus of this thesis will be on intra-European BITs, some ECT cases will be referred too.

\footnote{OECD Investor-State Dispute Settlement Public Consultation (2012), p. 8} \footnote{Ibid., p. 8} \footnote{Although this thesis will consider BITs between Norway and EU Member States, which are also extra-EU BITs}
1.4 Methodology

A methodological challenge when writing about arbitration is that many cases remain confidential. While the issue of confidentiality is presumed to be larger in commercial arbitration, investor-state arbitration does often take place under the procedural rules of an arbitration institution just like cases of commercial arbitration often do. These sets of rules often offer confidentiality, such as the rules of the London Court of International Arbitration or the Stockholm Chamber of Commerce. It is therefore assumed that there exists case law on the topic of this thesis that is not publicly available.

One of the specific characteristics of BITs that set this system apart is its fragmented and bilateral basis. Although intra-EU BITs are largely similar in terms of the investment protections they provide, they are bilateral treaties, meaning that they are negotiated on a bilateral basis and do differ in the details. Furthermore, its legitimacy and democratic underpinnings derive from its two signatory states and does not extend beyond these two parties. This may carry implications for the transferable value of decisions of the CJEU or of an arbitral tribunal on the topic of incompatibility with the EU set of rules. In the same vein, the lack of any doctrine of *stare decisis* in international investment law diminishes the value of previous tribunal's conclusions for determining future implications in the field, although tribunals do often look to former tribunals for arguments and past practices. Case law will therefore be used primarily for its argumentative value and to illustrate practice.

1.5 Outline and structure

This thesis will first provide a background of investment arbitration in Europe (Chapter 2). Second, the thesis will ask the question of how tribunals should evaluate EU/EEA law when adjudicating investment disputes (Chapter 3). Third, this thesis will analyze to what degree ISDS based on an intra-EU BIT is compatible with the supremacy of the CJEU as the forum for dispute settlement for disputes involving EU law and EU Member States, and to what degree the same supremacy challenge arise in relation to the EEA Agreement and Norwegian internal law (Chapter 4). Fourth, the thesis will suggest measures to mitigate the issues discussed.

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18 Böckstiegel (2012) p. 586
20 For instance, there are often differences in the fora for ISDS in the BITs, in the type of disputes that can be brought before arbitration, and in the amount of months necessary for negotiations or otherwise amicable settling of a dispute.
21 Dolzer and Schreuer (2012) p. 33-34
22 Ibid., p. 33. Examples include the *Electrabel v. Hungary* case, where the Tribunal mentions the *Maffezini v. Spain* (an extra-EU BIT) case as an example of a case where "EU law has been interpreted and applied by several ICSID tribunals, without raising any insuperable problems for the European Union" (para 4.165)
cussed (Chapter 5). The thesis will make some concluding remarks on the direction in which intra-EU BITs seem to be heading, and the effect this is likely to have on Norwegian BITs.

2 The object, purpose and functioning of intra-European BITs

2.1 Investment Arbitration in Europe

The question of respecting the property rights of foreign aliens pursuant to public international law has existed for a much longer time than the European Union has. The topic was debated as early as in 1796 by John Adams. Since then, the basis and boundaries of the concept has evolved multiple times. Today the basis is often a BIT. BITs in their modern form were first introduced in 1959 with a BIT entered into between Germany and Pakistan. It was not until a decade later, though, that the provision of ISDS through arbitration was introduced in BITs, starting with a treaty between Chad and Italy in 1969. Today, most BITs contain an ISDS provision. The opportunity to arbitrate a dispute under a BIT against the state is among the most prominent reasons why investors consider BITs as an appropriate tool for increasing FDI.

The number of disputes adjudicated through ISDS has increased vastly over the last decades. From only one or two disputes a year globally in the late 1980s and early 1990s, there were 42 known cases in 2014, out of which 11 were intra-EU cases. FDI flows have increased substantially over the last thirty years – from $50 billion in the early 1980s to to $1.23 trillion in inflows in 2014. International investment agreement (“IIA”) are designed to protect and promote FDI. These agreements are typically divided into BITs and other IIAs, which can for example be multilateral such as the ECT. In October 2015, the total number of IIAs was almost 3 300 globally. As of June 2015, the number of intra-EU BITs circled around 200, a number which has decreased slightly as some European states are choosing to terminate their BITs, such as Ireland and Italy did in 2012 and 2013. Sweden has stated that it is prepared to

23 Dolzer and Schreuer (2012) p. 1
24 Ibid., p. 6
25 Ibid., p. 7
26 Out of the 14 BITs Norway has engaged in, two do not contain ISDS provisions, the BITs with Madagascar and China.
27 Alvik and Dolva (2006) p. 20
28 UNCTAD World Investment Report (2015) pp. 112-114; As noted in the UNCTAD report, these are the numbers of publicly known disputes. The real numbers are likely higher.
29 Dimopoulos (2011) p. 8
32 European Commission Press Release, Commission asks Member States to terminate their intra-EU bilateral investment treaties (2015)
end all of its intra-EU BITs as long as this happens in a harmonized fashion in which all intra-EU BITs are ended, and the Commission ensures the continued investment protection that the Treaties provides for.\textsuperscript{33} The Czech Republic has terminated some of its BITs,\textsuperscript{34} and Poland is considering a similar approach,\textsuperscript{35} while the Netherlands has opposed termination.\textsuperscript{36} The Commission has repeatedly uttered its disapproval of intra-EU BITs by amongst other actions submitting \textit{amicus curae}’s to case proceedings\textsuperscript{37} and by initiating formal infringement proceedings against five Member States in June 2015.\textsuperscript{38} At the same time, the EU is currently in the process of negotiating or enacting regional free-trade agreements (“FTAs”) with investment chapters, such as the Transatlantic Trade and Investment Partnership (“TTIP”), the Comprehensive Economic and Trade Agreement between the EU and Canada (“CETA”), the EU-Vietnam FTA and the EU-Singapore FTA.\textsuperscript{39}

Norway has 14 active BITs, of which seven are with EU countries.\textsuperscript{40} Norway has not signed or negotiated any new BITs since the mid-90s, citing constitutional issues as one of its concerns.\textsuperscript{41} At the same time, there are currently governmental efforts working on developing a new model-BIT for Norway,\textsuperscript{42} which is, \textit{inter alia}, a response to a stance expressed by Norwegian corporations that see Norwegian BITs as desirable.\textsuperscript{43} The Norwegian trade situation is quite unique as Norway remains outside of the EU, but at the same time are close to the EU in political alignment and because of the EEA, EFTA and the Schengen partnership. Although Norway is not part of the EU, the direction in which intra-EU BITs are going is undoubtedly important for the direction in which Norwegian BITs will go, as the EU is not only one of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{33} Sweden’s answer to the Commission, p. 1
\item \textsuperscript{34} Markert and Titi (2014) p. 428
\item \textsuperscript{35} Bloomberg (2016)
\item \textsuperscript{36} For instance expressed in its written submissions to the \textit{Achmea} tribunal, see \textit{Achmea v. Slovakia}, Award on Jurisdiction, Arbitrability and Suspension, paras 155-163
\item \textsuperscript{37} In \textit{Electrabel v. Hungary}, the Tribunal allowed the European Commission to file a written submission as a non-disputing party, see Decision on Jurisdiction paras. 4.89 et seq.
\item \textsuperscript{38} European Commission Press Release, \textit{Commission asks Member States to terminate their intra-EU bilateral investment treaties} (2015)
\item \textsuperscript{39} TTIP is currently being negotiated between the EU and the US (European Commission, Commission Draft Text TTIP). CETA, the EU-Vietnam FTA and the EU-Singapore FTA are already negotiated, but not ratified yet (as of late April 2016).
\item \textsuperscript{40} Norway has a BIT with Poland, Hungary, Czech Republic and Slovakia, Romania, Estonia, Latvia and Lithuania.
\item \textsuperscript{41} Norwegian Government’s Knowledge and Documentation Department, Section for Research, \textit{Perspektiv 03/10} p. 10
\item \textsuperscript{42} Royal Norwegian Ministry of Trade, Industry and Fisheries, ref. 15/1625 (2015)
\item \textsuperscript{43} Norwegian Government’s Knowledge and Documentation Department, Section for Research, \textit{Perspektiv 03/10} p. 10
\end{itemize}
\end{footnotesize}
Norway’s most important trade partners, but also a legal framework that is closely intertwined with the EEA and Norway’s domestic legal order. Moreover, the two only publicly known ISDS cases under Norwegian BITs are with EU Member States: *Parkerings-Compagniet v. Lithuania* under the Norway-Lithuania BIT and *Telenor v. Hungary* under the Norway-Hungary BIT. There is also currently a pending case between Kristian and Geir Almås and Poland under the Norway-Poland BIT.

One of the characteristics of arbitration is that it is a neutral stage to resolve international disputes. Dolzer and Schreuer refer to this feature as “depolitzing” the dispute in a way that steers the focus away from the relations between the host state and the home state of the investor. Arbitration is, in the words of Shelkoplyas, of a private-procedural character, while EU law is of public-substantive character. While it is true that the EU law does not have a common procedural law, this statement would then suggest that the two sets of rules do not overlap and consequently do not conflict with each other. However, Shelkoplyas is writing about commercial arbitration, which arguably is to a larger extent of a private character than investment treaty arbitration. If applied to investment treaty arbitration, Shelkoplyas’ statement presents a simplified picture at best. Investment treaty arbitration in Europe does precisely very often relate to public interest and substantive standards. An example is the case of *Achmea v. Slovakia* in which the Dutch health insurance company Achmea brought a claim against Slovakia for changing its regulations for private health insurance, and thus violating substantive standards of the Netherlands-Slovakia BIT.

Considering the ambiguity of these treaties in the European framework, it is tempting to ask the question of why investors argue so strongly to keep the right arbitrate under these treaties. What is the arbitration advantage within Europe? BITs were historically primarily enacted for investors to be confident that they would have certain procedural and substantive rights when investing in third-countries whose legal and political frameworks differed a lot from that of

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44 European Commission, Trade (2015)
45 PCA Case Repository
46 Shelkoplyas (2003) p. 8
47 Dolzer and Schreuer (2012) p. 23
48 Shelkoplyas (2003) p. 15
49 Ibid., p. 13
50 It should be pointed out that I do not believe Shelkoplyas intended to apply this statement to investment arbitration, but the statement illustrates the differences between commercial arbitration and investment arbitration in an EU setting in a useful way.
51 Formerly known as Eureko.
52 *Achmea v. Slovakia*, Award, para 126
the investor’s home country. Most disputes under a BIT have taken place between an investor of a European or North American country, investing in a developing country. When dealing with intra-European BITs, the same justification of "foreignness" does not apply. Yet, based on the picture that available case-law portrays, one assumption of this thesis is that investors prefer ISDS to domestic adjudication once an investment dispute has arisen.

2.2 Relevant differences between the EU and EEA frameworks for an international investment law setting

The most relevant characteristics of EU law are its primacy over the laws of the Member States, and its direct effect. The primacy was first stated in jurisprudence in the CJEU’s conclusion in the landmark case of *Costa v. ENEL*, and has later been cemented by following case-law and CJEU opinions. The direct effect of EU law, meaning that a substantial amount of EU law does not have to be implemented by the Member States to be binding internally, was first recognized in another landmark case, *Van gend & Loos*.

The most apparent difference between the EU and the EEA in an international investment law setting is that there is no equivalent of direct effect in the EEA. The EEA Agreement is only binding as international law. Thus, if provisions of the EEA framework would counter BIT obligations, there would be no parallel issue of supremacy between the procedural rights of the two sets of rules. This hypothesis is furthermore supported by the fact that the context and the objectives of the EEA Agreement and of the EU framework vastly differ. As pointed out in the CJEU’s opinion 1/91 on the Agreement creating the European Economic Area, the EEA agreement is an international treaty with no transfer of sovereign rights, whereas the EEC Treaty (now equivalent to the Treaty on the Functioning of the European Union (“TFEU”) and the Treaty on European Union (“TEU”)) is the constitutional charter of a legal order comprising for instance primacy over Member States’ domestic law and direct effect of certain parts of EU law. While the EEA Agreement includes the “four freedoms” and involves

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53 UNCTAD (2015) p. XI
54 To analyze the empirical effectiveness of BITs to promote investments is outside the scope of this thesis.
55 Opinion 1/91, para 21
56 Case 6-64, p. 599
57 See CJEU Opinions 1/09 para 65 and 2/13 para 166.
58 Case 26-62, p. 16
59 This thesis will collectively refer to the TFEU and the TEU as the "EU Treaties"
60 Opinion 1/91 paras 20-21
the EEA States in the EU single market,\textsuperscript{61} significant areas are omitted from the EEA Agreement, such as the EU’s trade policy.\textsuperscript{62}

\textsuperscript{61} EEA Agreement Article 1
\textsuperscript{62} Royal Norwegian Ministry of Foreign Affairs (2013)
3 The role of EU/EEA Law in investment arbitration

The first question to be asked when analyzing to what extent an investment arbitral tribunal can adjudicate these disputes is how the EU legal framework should be characterized. Where-as a BIT is an international agreement part of public international law, there are at least three different options for characterizing EU law: as part of public international law, as part of the domestic legal orders of the Member States, or the EU as a special set of legal norms: a *sui generis* system. How the EU legal framework is viewed in an international investment setting affects whether EU law has to be regarded as part of the dispute by the tribunal. If EU law is subject to the dispute, the CJEU’s exclusive right to ensure the autonomy of EU law through interpretation of EU law and adjudication of EU law disputes with Member States might be affected by the ISDS adjudication.⁶³ The question is if an arbitral tribunal would have to apply EU law to decide whether it has jurisdiction or to decide the merits of the case, and if that has implications for whether the tribunal has jurisdiction to hear the case.⁶⁴ Investment treaty arbitral tribunals possess what is often referred to as *kompetenz-kompetenz*,⁶⁵ which means the competence to give itself competence. Thus, it is up to the arbitral tribunal to deem if it has jurisdiction in a given case, for example if it has jurisdiction to interpret EU law, and what the applicable law of a dispute is.

Hindelang points out that it’s only if EU law is subject to the substance of the dispute, that the possible conflict arises.⁶⁶ In a letter by the Commission Directorate-General of Internal market and Services from 2006 to the Czech Ministry of Finance, quoted in the *Eastern Sugar* case, the Commission interpreted this requirement as that Member States cannot use ISDS pursuant to a BIT if the subject of the dispute is an EU competence.⁶⁷ Whether a dispute relates to an EU competence has to be evaluated on a case-by-case basis, but suffice to say that the EU competition rules is an exclusive EU competences that typically may be subject to an intra-EU BIT dispute.⁶⁸ The same issue might arise if the subject is a shared competence, such as for instance the internal market, the environment and the common agricultural policy.⁶⁹

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⁶³ Pursuant to Article 267 and Article 344 TFEU – the thesis will analyze these provisions in chapter 4.
⁶⁴ For an example of the distinction, see *Achmea v. Slovakia*, Award on Jurisdiction, Arbitrability and Suspension, paras 279-283 where the tribunal says that it might have to apply EU law in the merits phase, but that this does not deprive the tribunal of its jurisdiction. Furthermore, the tribunal declines the respondent’s arguments that it should consider EU law when evaluating its jurisdiction as such.
⁶⁵ This competence is codified in for instance the ICSID Convention Article 41(1)
⁶⁶ Hindelang (2011) p. 230
⁶⁷ Article 344 TFEU; Burgstaller (2011) pp. 71-72; *Eastern Sugar v. Czech Republic*, Partial Award, para 119
⁶⁸ Article 3 TFEU
⁶⁹ Article 4 TFEU
The latter policy was discussed in the case of *Eastern Sugar*, which will be discussed in the following chapter. It will be assumed in the following that the subject of an intra-EU dispute touches on an EU competence.

In this section, the thesis will analyze these three different approaches the tribunal might take to characterize the EU legal framework, and the implications for the applicable law a tribunal will employ. It will then compare the three and conclude on which approach should be employed by an ISDS tribunal.

### 3.1 Public international law perspective on EU law

If one sees the EU hierarchy of rules and norms as part of public international law, then following the customary rule of interpretation codified in the Vienna Convention on the Law of Treaties (“VCLT”) Article 31(3)(c), it is applicable for the tribunal. In its written submission as a non-party to the case of *Electrabel v. Hungary*, the Commission argued that EU law is international law, citing case law from the European Court of Human Rights (“EctHR”) to support its position. The Commission’s subsequent argument was that if there is a conflict between the EU law and the other norm of international law, flowing from the ECT in the case of *Electrabel* and from BITs in other similar cases, EU law prevails. This is similar to the statement of the Commission Directorate-General of Internal market and Services to the Czech Ministry of Finance who argued that: “Since Community law prevails from the time of accession, the dispute should be decided on basis of Community law.” The * Electrabel tribunal agreed that EU law, both its primary and secondary legislation, is international law because it is based on international treaties, the EU Treaties. However, the Tribunal did not agree with the Commission that EU law should necessarily prevail: from a public international law perspective there is no justification for viewing EU

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70 *Eastern Sugar v. Czech Republic*, para 220; Wierzbowski and Gubryniewicz (2009) p. 553
71 VCLT Article 31(3)(c) states that ”any relevant rules of international law applicable in the relations between the parties” “shall be taken into account, together with the context.”
72 This case is rendered pursuant to the ECT, not a BIT, but the questions relevant to this treaty are parallel to those that arise in an intra-EU BIT dispute.
73 *Electrabel v. Hungary*, Decision on Jurisdiction, para 4.102; The *Electrabel* case is rendered under the ECT, but the issues relevant to this thesis are parallel to those that arise in similar intra-EU BITs disputes.
74 Ibid., para 4.109
75 Burgstaller (2011) p. 73; *Eastern Sugar v. Czech Republic*, Partial Award, para 119
76 *Electrabel v. Hungary*, Decision on Jurisdiction, para 4.120
77 Ibid., para 4.122-123
law as paramount to other sources as law, such as the BIT.\textsuperscript{78} The doctrines of primacy of EU law and supremacy of the CJEU’s jurisdiction will not automatically “trump” the BIT, as they will be sources of law on the same hierarchical level as the BIT and other sources of international law. Following the same logic, there are no good justifications for the divide between intra- and extra-EU BITs.\textsuperscript{79} When the Commission issued a formal notice to Sweden for not terminating the Sweden-Romania BIT, Sweden argued in its reply that there is no legitimate reason to differentiate between intra-EU BITs and extra-EU BITs in regards to the procedural rights these treaties confer upon its parties and investors.\textsuperscript{80} Sweden argues that in both scenarios, the disputes relate to interpretation of the relevant BIT, and that it would not be necessary to apply EU law to resolve the dispute.\textsuperscript{81} A counter-argument is that the dispute does not relate to the interpretation of the BIT in a vacuum, but to how the BIT fits into the transformed legal framework of its signatory parties. This latter view was stated in an oft-cited passage of the \textit{Asian Agricultural Products v. Sri Lanka} case:

“Furthermore, it should be noted that the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.”\textsuperscript{82}

The same line of reasoning can be applied to the question of applicable law in intra-EU BITs disputes, and has indeed been applied in for instance the \textit{Achmea} case.\textsuperscript{83} Thus, from a public international law perspective, the applicable law can be both EU law and the BIT itself, interpreted in line with the principles found in VCLT Article 31.

\subsection{3.2 Domestic law perspective on EU law}

Another way of looking at EU law is as an integrated part of the Member States’ domestic law. If a BIT is part of public international law, it can be argued that the EU rules that it may be incompatible with are part of the state’s domestic law.\textsuperscript{84} Whether domestic law is applica-

\textsuperscript{78} \textit{Electrabel v. Hungary}, Decision on Jurisdiction, para 4.126
\textsuperscript{79} Rovetta (2013) p. 222
\textsuperscript{80} Sweden’s answer to the Commission, p. 10
\textsuperscript{81} Ibid., p. 10
\textsuperscript{82} \textit{Asian Agricultural Products v. Sri Lanka}, Award, para 21
\textsuperscript{83} \textit{Achmea v. Slovakia}, Decision on Jurisdiction, Arbitrability and Suspension, paras 226-228
\textsuperscript{84} Wackernagel (2016) p. 10
ble for the investment treaty arbitral tribunal depends on the BIT in question as well as the seat of the arbitration and its procedural rules. For instance, the seat of the Achmea case was in Frankfurt, Germany, which made German law applicable as the governing procedural rules of the arbitration.\footnote{Achmea v. Slovakia, Decision on Jurisdiction, Arbitrability and Suspension, para 224} If EU law is applicable for the tribunal as domestic law, it becomes irrelevant whether there is a conflict between the EU law and the BIT, because domestic law cannot justify a failure to comply with international obligations, pursuant to Article 27 VCLT.\footnote{Wackernagel (2016) p. 10; Article 27 VCLT states that domestic law cannot be used as a justification for escaping obligations of a treaty}  A version of this was presented in the case of AES Summit Generation, where the tribunal stated that once EU law had been incorporated in the Member State, it was domestic law that could not justify a breach of international obligations.\footnote{AES Summit Generation v. Hungary, Award, para 7.6.6.} However, the tribunal also recognized that EU law had a dual nature. Not many scholars have to my knowledge proclaimed that EU law is only part of the Member States’ domestic law.

### 3.3 The “sui generis” perspective on EU law

The tribunal in the Electrabel case stated that “EU law is a sui generis legal order”,\footnote{Electrabel v. Hungary, Decision on Jurisdiction, para 4.117} meaning that it is a multifaceted legal system that can be analyzed both on an international level and on a domestic level. If one accepts the argument first set forth in the Van Gend & Loos case\footnote{C-26/62 Van Gend & Loos was the first case to characterize the EU legal order as a sui generis system, on p. 12} that EU law is a sui generis legal system it follows that EU law will not be part of the applicable law for an investment treaty arbitral tribunal. The tribunal can then only apply EU law to the extent that it is applied as facts, not as law.\footnote{Hindelang (2012) p. 191} The difference between the two becomes apparent in relation to the rules of conflict of international law, as the arbitral tribunal cannot resolve a conflict between EU and BIT obligations when the EU rules are only seen as facts. The CJEU is familiar with this distinction, as it is similar to its own doctrine of applying the national law of the Member States as “facts” as the CJEU does not have the competence to interpret national law.\footnote{The competence of the CJEU is negatively defined in TFEU Section 5, Articles 251 – 281.}

In Electrabel the Tribunal first stated that:

> “As a result of the Tribunal’s international status under the ECT and the ICSID Convention, several of the Commission’s submissions cannot be taken into account in this arbi-
tration, because they are based on a hierarchy of legal rules seen only from the perspective of an EU legal order applying within the EU, whereas this Tribunal is required to operate in the international legal framework of the ECT and the ICSID Convention, outside of the European Union.”

Thus, the Tribunal disregarded some of the Commission’s submissions because, in the view of the Tribunal, they were contentions on another level of law. If EU law is viewed as either a sui generis system or part of the Member States’ domestic legal systems, and not part of public international law, and intra-EU BITs are part of public international law, it can be argued that the doctrines of primacy and of supremacy has no bearing on the applicability of the intra-EU BITs as these treaties will then be separate from the scope of EU legal principles.  

The Electrabel Tribunal continued by stating that even if the Tribunal may not apply EU law as law, “EU law must in any event be considered as part of the Respondent’s national legal order, i.e. to be treated as a “fact” before this international tribunal.” The Tribunal saw its mandate as finding a balance “as required by the ECT, the ICSID Convention and the applicable rules and principles of international law” between “the substantive and procedural protections of rights of a foreign investor and the economic integration of EU Member States into the European Union operating under the rule of law.” In the Achmea case, the tribunal also compared the subject matter of the BIT with the EU legal framework when analyzing whether any of the VCLT rules of conflict would apply. The tribunal applied the VCLT rules as law, and merely used the EU law as a fact to analyze whether the relevant VCLT rule applies. That the tribunal applies the EU law as facts seems to be a trend in intra-EU BIT disputes.

3.4 Is there one “right” perspective to look at EU law from?

The EU legal order as a whole is both domestic and international in nature. That the classification is not necessarily one and not the other has been expressed by tribunals: In Electrabel, the Tribunal first stated that EU law could be deemed a sui generis system, as previously mentioned. The Tribunal then concluded that EU law should be “classified first as interna-

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92 Electrabel v. Hungary, Decision on Jurisdiction, para 4.112
93 And vice versa if EU law is international law: see EURAM v. Slovakia, Award on Jurisdiction, para 73, where the tribunal concluded that EU law was part of international law so that EU law’s “relationship with the BIT is itself a matter governed by the relevant rules of public international law.”
94 Electrabel v. Hungary, Decision on Jurisdiction, para 4.127
95 Ibid., para 4.113
96 Achmea v. The Slovak Republic, Award on Jurisdiction, Arbitrability and Suspension, paras 265 and 277
97 Electrabel v. Hungary, Decision on Jurisdiction, para 4.117
tional law.”98 It cites the French version of the Kadi case, in which the EU legal system was referred to as “un ordre juridique interne d’origine international”99 – an internal legal order of international origin (My translation). This quote signifies that there might be more than one “right” way to characterize EU law, depending on the circumstances. This is also the view expressed by the Tribunal in the Achmea case:

“The Tribunal cannot derive any part of its jurisdiction or authority from EU law as such: its jurisdiction is derived from the consent of the Parties to the dispute, in accordance with the BIT and German law. Although EU law, as between the EU and member States of the EU (including Respondent and the Netherlands, but not Claimant), operates at the level of international law, EU law operates, as between the Parties, as part of German law as the lex loci arbitri.”100

The trend seems to be that tribunals interpret EU law as to a certain extent international law, and that it therefore may apply EU law. The tribunals often employ the distinction between applying law as law and as facts even if not viewing EU law as first and foremost a sui generis system. The Electrabel Tribunal states that even in the scenario that it cannot apply EU law as international law, it can anyways apply it as facts.101 Moreover, the Tribunal stated that it can adequately solve the disputes without applying EU law as law. The Tribunal expressed it this way:

“Although the Tribunal is required in this arbitration to interpret the European Commission’s Final Decision of 4 June 2008, and in that sense, to apply EU law to the Parties’ dispute, the Tribunal is not required to adjudicate here upon the validity of that decision, (…) This Tribunal is not therefore required to review and does not here review the legality of any act of any EU institution, including the European Commission.”102

Some cases interpret the distinction between applying law as law and as facts more freely than others, though: In the Eastern Sugar case, the tribunal did take into account EU law when analyzing Czech legislation in response to the Common Agricultural Policy.103 The tribunal stated that “On its face, the Czech legislation may have appeared “adequate”, if that word is

98 Ibid., para 4.119 et seq
99 Ibid., para 4.118; Opinion of the Advocate General Maduro in C-402/05 Kadi, para 21
100 Achmea v. Slovakia, Award on Jurisdiction, Arbitrability and Suspension, para 225
101 Electrabel v. Hungary, Decision on Jurisdiction, para 4.127
102 Ibid., para 4.198
103 Eastern Sugar v. Czech Republic, paras 219 ff.
used properly by the European Commission, which is doubtful.” 104 The Tribunal seems to suggest that the Czech implementation of the Common Agricultural Policy was in line with neither Czech law nor EU law. 105 This illustrates that the line between applying law as a fact and as a law is hard to define, and that it’s easy to wander into the territory of the exclusive jurisdiction of the CJEU.

What are the outcomes of these disputes? There are two scenarios that can arise when an investment treaty arbitral tribunal decides a case where EU law is subject to the dispute: 106

The first is that it completely disregards EU law. Schill analyzes possible ways of mitigating the issue of having an investment treaty arbitral tribunal disregard EU law when a measure is in line with EU law but a breach of a BIT, which he calls “factual spillover effects.” 107 It should be noted that Schill’s analysis is targeted towards the potential future enactment of IIA’s undertaken by the EU as a whole. 108 He argues that the problem of measures being legal under EU law while violating obligations under an EU IIA can be solved by designing such EU IIA’s to limit the applicable law in a dispute to that of the EU IIA and international law, excluding applying EU law as law. 109 If one succeeds in designing treaties where no dispute can arise that relates to EU law, that approach seems viable. However, in relation to the existing intra-EU BITs the problem is precisely that often the dispute relates to EU law in so far that it arises because the state takes measures it believes is in line with EU obligations. 110

Even if the award does not produce results that are immediately in violation of EU law, the conflict regarding EU rules is not resolved if the tribunal disregards EU law. It is left up to the states that are parties to the BIT in question to resolve the conflict, which might take a long time as it would depend on domestic political action. 111 According to Shelkoplyas, EU law arguments are in the majority of the cases in commercial arbitration used as a defense arguing that there is no jurisdiction or that the claims on the merits have no basis because of substantive EU provisions – it is not often used as arguing in favor of a substantive claim. 112 The

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104 Ibid., para 220
105 Wierzbowski and Gubryniewicz (2009) p. 553
106 Hindelang (2012) pp. 196-197
107 Schill (2013) p. 13
108 Ibid., p. 2
109 Ibid., p. 14
110 This is the case in most intra-EU BIT disputes, such as Micula v. Romania, Final Award, para 315; Eastern Sugar v. Czech Republic, Partial Award, paras 235-242;
111 Hindelang (2012) p. 191
112 Shelkoplyas (2003) p. 16
same is true for investment arbitration cases in the EU, as illustrated by cases such as the *Eastern Sugar* case where the Czech Republic used EU law as a defense both against the jurisdiction of the tribunal and to justify its actions in the merits of the case.113

The second alternative is that the tribunal does apply EU law, and that its interpretation might differ from that of the CJEU because of differences in objectives and the context.114 One example is the previously mentioned interpretation of EU law in the *Eastern Sugar* case.115 Another statement that resembles an application of EU law in such proceedings is found in the *Achmea* case, where the tribunal stated that: “The Tribunal can consider and apply EU law, if required, both as a matter of international law and as a matter of German law.”116 The state then runs the risk of, again, violating EU law and its principle of primacy by respecting a tribunal’s interpretation of the EU law. There are therefore shortcomings with all of the perspectives, and reconciling the BIT and EU obligations through adjudication is challenging. The interim conclusion of this thesis is that an ISDS tribunal should view EU law as primarily international law, and apply EU law in order to adequately solve the dispute. In chapter 4 and 5 this thesis will consider the challenges this approach brings with it and ways to mitigate them.

### 3.5 The EEA legal framework in a European investment law setting

While the EU legal framework can be characterized in at least three different ways, the EEA legal framework is a more clear-cut public international law agreement. The Agreement is only binding as international law, and has no direct effect. Therefore, if one envisions that an investor-state arbitral tribunal did render an award that was contrary to the state’s EEA obligations, the state would only be bound by international law to abide by the EEA Agreement. To flip the coin, the character of the EEA Agreement also entails that the question of applicable law would be less complex: it seems clear that a tribunal would have to view the EEA Agreement as international law, and thus as part of the applicable law if relevant to the BIT dispute.

The risk of having an arbitration tribunal interpreting the EEA Agreement would still potentially rise the same conflicts as mentioned for the EU case. Article 111 of the EEA Agreement stipulates that a dispute relating to the interpretation or application of the agreement can be brought before the EEA Joint Committee, a body mandated with ensuring the effective im-

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113 *Eastern Sugar v. Czech Republic*, paras 97 ff.
114 Opinion 1/91 para 29
115 See supra note 81
116 *Achmea v. Slovakia*, Decision on Jurisdiction, Arbitrability and Suspension, para 283
plementation and operation of the agreement pursuant to Article 92(1) EEA. There is a narrow possibility for arbitration established in Article 111(4) EEA, which, interestingly, explicitly excludes a question of interpretation of the EEA Agreement from being dealt with through arbitration.

There is very little practice and case-law to shed light on how these challenges could come up in practice. In the two intra-European BIT cases with Norwegian claimants that are publicly known,\textsuperscript{117} the EU/EEA law was not discussed as applicable to the dispute. It is possible to envision a case where Norway has taken certain measures in order to respect its EEA obligations, and a foreign investor from one of the seven EU countries Norway has a BIT with would bring a claim of breach of the BIT under investment arbitration. This would be parallel to many of the intra-EU BIT disputes mentioned in this thesis. It is likely that in such a scenario, the tribunal would apply a similar line of logic to the one utilized in these cases: that the dispute can adequately be resolved without interpreting the EEA Agreement \textit{as law}, thereby circumventing Article 111(4) EEA that prohibits interpretation of the EEA Agreement through arbitration. For the same reasons as in the EU scenario, this would not adequately solve the dispute if EEA law is part of the dispute. In chapter 4.2.2, this thesis will illustrate that there are some differences between the EU and the EEA scenarios that affect the conclusion on incompatibility of ISDS adjudication.

\textsuperscript{117} Telenor v. Hungary and Parkerings-Compagniet v. Lithuania
4 Threatened supremacy and exclusivity? Investor state dispute settlement for European states

The question of whether ISDS tribunals can interpret EU/EEA law as law is intertwined with the question of whether the tribunals can decide a dispute involving an EU/EEA member state and an EU/EEA investor. These two questions are distinct in the way that the latter one relates primarily to the forum for dispute resolution in disputes involving the interpretation of EU/EEA law, and the former as the exclusive interpreter of EU/EEA law. This chapter will analyze the latter question, first from an EU perspective and then from an EEA and Norwegian perspective. It is in the following assumed that EU law is subject to the dispute.

4.1 Supremacy challenges in a EU setting

In this section, the thesis will look at issues that potentially arise for ISDS in relation to the supremacy of the CJEU as a forum for dispute resolution in cases involving EU law. The hypothesis is that if investment treaty arbitral tribunals cannot refer a question for preliminary reference to the CJEU pursuant to Article 267 TFEU the dispute resolution is inconsistent with Article 344 TFEU. Article 267 TFEU regulates preliminary references to the CJEU. The relevant part for this thesis is found in Article 267(2) TFEU:

“Where such a question [a question concerning the interpretation of the Treaties or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union] is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.”

Article 344 TFEU regulates the dispute settlement mechanisms available to Member States in disputes involving EU law:

“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.”

The respondent state in intra-EU BIT cases often alleges that an ISDS tribunal should reject jurisdiction because of both these two grounds, Article 267 TFEU and Article 344 TFEU. One example of this is the case of Achmea v. Slovakia, which has taken place both in arbitration
and domestic courts. In the Court of Appeals of Frankfurt, Germany, the Court struck down Slovakia’s contentions based on Article 267 TFEU and Article 344 TFEU.\(^\text{118}\)

4.1.1 Lack of recourse to preliminary references to the CJEU pursuant to Article 267 TFEU

The question in this chapter is whether investment treaty arbitral tribunals could or should have a right to refer a question for preliminary reference to the CJEU, and if not, what conclusions that implies for the compatibility of adjudication under intra-EU BITs with EU law.

A right and obligation to refer a question of interpretation of EU law to the CJEU ensures a uniform interpretation of the law, and the CJEU’s exclusive competence for having the final word in interpreting the EU law. Preliminary references are considered successful for obtaining these goals.\(^\text{119}\) The judges of EU Member States’ domestic courts always have the opportunity of referring a question of the interpretation of EU law to the CJEU, and they have a duty to do so if ruling in a court “against whose decisions there is no judicial remedy under national law.”\(^\text{120}\)

It has been debated whether investment treaty arbitral tribunals could have the right to submit preliminary questions to the CJEU. For this right to exist, the tribunal would first have to apply EU law, which this thesis concluded in chapter 3 that it should in order to adequately solve the dispute. Second, the CJEU would have to deem investment treaty arbitral tribunals as a “court or tribunal of a Member State” as stated in Article 267(2) TFEU.\(^\text{121}\) The CJEU decided in the Nordsee case in 1982 that an arbitral tribunal in a private dispute cannot refer questions of preliminary reference to the CJEU, because such tribunals derive their legitimacy from the private agreement and are thus not a “court of tribunal of a Member State.”\(^\text{122}\) In the Miles case, the CJEU stated that there are two components for evaluating whether a court or tribunal falls within the scope of Article 267 TFEU: First, it must be a court or tribunal, which is determined by factors such as whether it is established by law, has compulsory jurisdiction, is \textit{inter partes}, etc.\(^\text{123}\) An arbitral tribunal would be very likely to meet those criteria. Second, the court or tribunal must be “of a Member State”, which is where the problem lies both in the

\(^{118}\) 26 Sch 3/13
\(^{119}\) Dolzer and Schreuer (2012) p. 35, in the context of preliminary rulings in general
\(^{120}\) Article 267(3) TFEU
\(^{121}\) Hindelang (2012) p. 201
\(^{122}\) C-102/81 Nordsee para 13; Rovetta (2013) p. 226
\(^{123}\) C-196/09, Miles para 37
Miles case\textsuperscript{124} and in relation to intra-EU BIT tribunals. Hindelang argues that an investment treaty arbitral tribunals can, contrary to commercial arbitration tribunals, be deemed “a court of a Member State” since it is of a more permanent nature and gives Member States the responsibility of compliance with the BIT with binding force,\textsuperscript{125} contrary to commercial arbitral tribunals that are of a more interim and ad-hoc based nature. Dimopoulos has argued that investment treaty arbitral tribunals cannot request preliminary rulings from the CJEU,\textsuperscript{126} supporting his argument by the same line of reasoning that was used in the Eco Swiss case: That the arbitrators are not obliged to on their own initiative consider questions of incompatibility with EU law, nor are the Member States obliged to interfere in ongoing arbitration proceedings.\textsuperscript{127} Dimopoulos also points out that arbitration is not a mandatory type of dispute settlement for the investor.\textsuperscript{128}

Since the essence of the argument in the Nordsee case seems to be that the commercial arbitration award derived its competence from a private agreement, the applicability of that decision to investment treaty arbitral tribunals is not certain. Investment treaty arbitral tribunals derive their competence from the law, i.e. from the BIT, which is a public international law treaty.\textsuperscript{129} In opinion 1/09 on the European and Community Patents Court, the CJEU stated that the right of such a court to be able to refer a question for preliminary reference to the CJEU was of paramount importance in order to ensure the autonomy of the EU law.\textsuperscript{130} In the same vein, providing investment treaty arbitral tribunals with this right could ensure the autonomy of EU law.

Should the solution then be that tribunals are allowed to refer questions of preliminary reference to the CJEU? First, it can be established that if it should have a right, it should be a duty: the ISDS tribunals’ awards are final, which if the logic behind Article 267(3) TFEU is applied renders it a duty.\textsuperscript{131} Moreover, it should be a duty because it can be expected that tribunals would not otherwise utilize the opportunity.\textsuperscript{132} When confronted with the Czech Republic’s arguments for why the tribunal should try to make a reference to the CJEU, the Eastern Sugar Tribunal stated:

\begin{itemize}
\item \textsuperscript{124} C-196/09, Miles para 43
\item \textsuperscript{125} Hindelang (2012) pp. 202-203; Hindelang (2011) p. 233
\item \textsuperscript{126} Dimopoulos (2011) p. 87
\item \textsuperscript{127} C-126/97 Eco Swiss v. Benetton, para 34
\item \textsuperscript{128} Dimopoulos (2011) p. 87
\item \textsuperscript{129} Rovetta (2013) p. 227
\item \textsuperscript{130} CJEU Opinion 1/09, para 83
\item \textsuperscript{131} Arnesen (2016)
\item \textsuperscript{132} Wierzbowski and Gubrynowicz (2009) p. 553
\end{itemize}
“Even if the Arbitral Tribunal had discretion to refer (and this is as high as the Czech Republic puts its case), the Arbitral Tribunal sees in any event no reason to make a referral in a case where the answer is not difficult.”\textsuperscript{133}

In the Achmea case, the German court concluded that it was not necessary to refer the question of the scope of Article 344 TFEU to the CJEU for a preliminary ruling although the application of these provisions to investment disputes is arguably ambiguous.\textsuperscript{134} While not publicly known, it is suspected that the Czech Republic filed a challenge to set aside the jurisdictional decision of the tribunal of the Binder case\textsuperscript{135} in Prague Courts and asked the court to make a preliminary reference to the CJEU.\textsuperscript{136} The Prague Court did set-aside the decision on jurisdiction, but a Czech Court of Appeals later found that the Prague Court did not have jurisdiction to set aside a preliminary decision of an ISDS tribunal. Before the Czech Republic had time to appeal that decision, the arbitral tribunal issued its award, dismissing all of Mr. Binder’s claims on the merits.\textsuperscript{137} No domestic courts have to date made a reference to the CJEU in an intra-EU BIT case. This illustrates that a domestic court might not always request a preliminary reference even if the parties desire it.

Second, there are good reasons why the CJEU should allow an investment treaty arbitral tribunal to refer questions for preliminary reference: The EU Commission repeatedly argue that an investment treaty arbitral tribunal has to apply EU law to sufficiently solve the dispute.\textsuperscript{138} Allowing investment treaty arbitral tribunal to make preliminary references pursuant to Article 267 TFEU would implicitly make this type of adjudication “a method of settlement” provided for in the treaties, as stated in Article 344 TFEU.\textsuperscript{139}

There are challenges with such a solution. One of the major reasons why arbitration proceedings exist is to have a dispute resolution mechanism that is independent of the host state. If the CJEU is given “supervisory” rights in regards to the interpretation of EU law in arbitral proceedings through a preliminary reference, the proceedings are no longer independent of the

\textsuperscript{133} Eastern Sugar v. Czech Republic, para 137
\textsuperscript{134} European Parliament Directorate-General For Internal Policies (2014) p. 256
\textsuperscript{135} Binder v. Czech Republic, Award on Jurisdiction
\textsuperscript{136} Burgstaller (2011)
\textsuperscript{137} IAREporter (2011); IAREporter (2012)
\textsuperscript{138} See for instance Electrabel v. Hungary, Decision on Jurisdiction, para 4.102
\textsuperscript{139} Arnesen (2016)
host state\textsuperscript{140} – although the host state is one Member State and the CJEU is not directly affiliated with any one Member State. The CJEU has a different approach and perspective to dispute resolution, as the CJEU is the permanent constitutional court of the EU. The CJEU functions in accordance with the principle of case precedents, and sees cases in perspective with the development of the EU legal order. The tribunal is only mandated with solving the one specific dispute in question.\textsuperscript{141} These differences in perspective could cause differences in the interpretation of EU law. While this perspective provides neutrality and focus on the specific dispute,\textsuperscript{142} it risks reaching conclusions detached from general policy considerations. Including the CJEU in the arbitral proceedings would on the one hand ensure autonomy of interpretation of the EU law, but on the other hand remove some of the independency and neutrality of the arbitral proceedings.

Would such a solution deprive the ordinary courts of the EU of their role? The CJEU stated in Opinion 1/09 that the Member States did not have the right to

“conferr the jurisdiction to resolve such 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 European Union law and, thereby, of the power provided for in Article 267 TFEU, or, as the case may be, the obligation, to refer questions for preliminary ruling in the field concerned.”\textsuperscript{143}

Eilsmanberger argues that since there is no obligation on the investor to seek any type of dispute settlement, there can be no disloyal “by-passing” of the ordinary courts or the CJEU.\textsuperscript{144} However, some intra-EU BITs do not explicitly offer the right to bring a dispute to a domestic court, only arbitration. For instance, the Article 8 of the Czech Republic/Slovakia-Netherlands BIT stipulates that the only offered forum for ISDS is arbitration if the dispute cannot be resolved amicably.\textsuperscript{145}

It can be debated whether such a dispute resolution provision that only opens up for arbitration excludes the investor from bringing a treaty-based dispute to the host state’s domestic

\textsuperscript{140} Schill (2013) p. 16
\textsuperscript{141} Shelkoplyas (2003) p. 10
\textsuperscript{142} Ibid., p. 10
\textsuperscript{143} CJEU Opinion 1/09, para 80
\textsuperscript{144} Eilmansberger (2009) p. 405
\textsuperscript{145} This is quite common, and is found in for instance the Norway-Poland BIT Article X(1) (1990), the Norway-Estonia BIT Article IX (1992),the Norway-Hungary BIT Article XI (1992), Norway-Latvia BIT Article XI (1992) and the Norway-Lithuania BIT Article IX (1992).
court system, thus *de jure* excluding the domestic courts from having competence, or if it only gives the investor a *right* to bring the dispute to arbitration and that the investor’s right to bring the dispute to domestic court’s exists independently of the BIT. On the one hand, the latter view seems like a reasonable interpretation, given that if there is no BIT, the legal recourse for the investor would be to seek remedies through the domestic courts. On the other hand, the whole point of providing a neutral and de-politicalized forum for dispute resolution is hollowed out if domestic courts are always an option even when not included in the BIT. It would be up to a tribunal to interpret such a clause, and up to a domestic court to assess its jurisdiction should a treaty-based claim be brought in front of it pursuant to an intra-EU BIT with an arbitration clause. It is likely that a domestic court faced with a treaty-based intra-EU BIT dispute with an arbitration clause would reject jurisdiction. Such a response would follow the line in commercial arbitration cases, where domestic courts reject jurisdiction if there is a valid and applicable arbitration clause in the dispute.\(^{146}\)

All in all, there are more reasons to allow investment treaty arbitral tribunal to make preliminary references to the CJEU than not to. It seems to be a way to make the system more viable and balanced.

4.1.2 Dichotomy between review of ICSID and non-ICSID awards in relation to implications for compatibility with EU adjudication

Having concluded that if an investment arbitral tribunal will consider and interpret EU law, it should also have a duty to refer questions of interpretation to the CJEU as a preliminary reference, the next question is whether this conclusion is affected by the type of arbitration. There are two main types of arbitration that will be considered: International Centre for Settlement of Investment Disputes (“ICSID”) arbitration and non-ICSID arbitration. Most non-ICSID awards\(^{147}\) are subject to the New York Convention (“NYC”).\(^{148}\)

The ICSID Convention Article 54 requires that the decisions rendered pursuant to the Convention are internally directly binding and enforceable. Articles 51 and 53 of the ICSID Convention prohibit any domestic court review of the cases, allowing only for ICSID’s own annulment proceedings.\(^{149}\) If an ICSID award is being enforced in the respondent state, there should not be a need to hold enforcement proceedings in court, as the ICSID award automati-

\(^{146}\) Such a provision is found in the Norwegian Arbitration Act Article 7, which is based on the UNCITRAL Model Law on International Commercial Arbitration (1985)

\(^{147}\) Such as awards pursuant to the rules of UNCITRAL arbitration, LCIA arbitration, SCC arbitration etc.

\(^{148}\) Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958

\(^{149}\) Rovetta (2013) p. 228
cally is converted to a domestic decision pursuant to ICSID Article 54(1). In other words, the ICSID tribunal has the final and only word on the outcome of the dispute. Therefore, the national court cannot refer a question for preliminary reference to the CJEU in enforcement or set-aside proceedings.

Assuming that the dispute does relate to EU law and that the tribunal does consider EU law as applicable, an external ICSID tribunal would interpret and decide matters of EU law with binding effect for the involved EU Member State without either the CJEU or the Member State in question having the possibility of recourse to the CJEU. The duty to make a preliminary reference to the CJEU is especially important for ICSID arbitration proceedings because of the finality of these awards, from an EU law perspective. In the set-aside proceedings of a non-ICSID case, the Achmea case in the Frankfurt Court of Appeals, the Court said that the possibility of a national court requesting a preliminary ruling in set-aside or enforcement proceedings was sufficient to ensure the autonomy of EU law. The Achmea case was seated in Frankfurt under the United Nations Commission on International Trade Law (“UNCITRAL”) arbitration rules. A similar conclusion was reached in the CJEU case of Eco Swiss relating to a state-to-state dispute: the possibility was deemed sufficient for the compatibility with the jurisdiction of the CJEU. However, had the Achmea case been under ICSID rules, the argument put forth by the Court would not apply.

Following the logic stated above in the Achmea and Eco Swiss cases, the need for such a duty for preliminary references by the ISDS tribunal might not be as pressing for the compatibility with the exclusive jurisdiction of the CJEU in relation to non-ICSID tribunals. An award pursuant to the NYC rules rendered by a tribunal seated in an EU Member State and where a Member State is party to the NYC can be brought into the domestic court system for post-decision review. A domestic court can challenge the decision as part of enforcement proceedings or set the decision aside as, for instance, contrary to public policy. It follows that such a domestic court might also refer questions of interpretation to the CJEU as part of these proceedings. It is likely that the if the CJEU was faced with a similar issue as in the Eco

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150 Dimopoulos (2011) p. 88
152 Ibid.
153 C-126/97 Eco Swiss v. Benetton, para 40
154 NYC Article 5
155 NYC Article 5(2)(b)
156 Schill (2013) p. 15
Swiss case stemming from an intra-EU BIT dispute, it would reach the same conclusion as in the Eco Swiss case because the reasoning is not tied to that case being a state-state dispute.

However, there is no guarantee that there will be enforcement or set-aside proceedings in a domestic court within the EU in a non-ICSID case. At the point in time where the ISDS tribunal renders its decision, there is no way of knowing whether there will be a possibility of post-decision review by the CJEU. The case might be enforced in a non-EU country, for instance. Furthermore, having the ISDS tribunal make the reference directly is more effective. Therefore, both ICSID and non-ICSID ISDS tribunals should have to make the reference itself as there is no guarantee that enforcement proceedings will take place in a domestic court within the EU.

4.1.3 Is an ISDS case a dispute submitted by a Member State within the meaning of Article 344 TFEU?

The current status of how ISDS under intra-EU BITs functions is that arbitrators do not attempt to make references to the CJEU. It is therefore in the following assumed that this right and duty does not exist. There is then no direct connection between ISDS adjudication and the EU Treaties.

ISDS is not “provided for” within the EU treaties when there is no preliminary reference through Article 267 TFEU. The question is if the dispute in an intra-EU BIT case is submitted by a Member State within the meaning of Article 344 TFEU. If the answer is affirmative, that brings ISDS disputes within the ambit of Article 344 TFEU, and renders ISDS adjudication a violation of Article 344 TFEU. The next step in the analysis is whether the Member States can bilaterally escape the obligations of Article 344 TFEU through conducting a BIT with ISDS provisions. In the Mox Plant case, the CJEU ruled that in a dispute between two Member States that relates to EU law, the Member States cannot decide between themselves that the CJEU does not have competence, under reference to what is now Article 344 TFEU. The Mox Plant case ruling does not have direct applicability to ISDS, but can the same line of reasoning be applied?

Although the BIT itself is a state-to-state agreement, the dispute is between one investor of the home state and the host state. It is already established through case law that arbitration

158 Albeit chapter 4.1.1. illustrated that the ISDS tribunal might not want to make such a reference
159 Article 344 TFEU
160 Case C-459/03 Commission v. Ireland (Mox Plant), paras 123 ff.
between two private parties with the arbitration seat in an EU Member State and subject to review by domestic courts, does not infringe upon the exclusive right of the CJEU to interpret EU law,\(^{161}\) as these are not disputes submitted by a Member State within the ambit of Article 344 TFEU.\(^ {162}\) Hindelang argues that Article 344 TFEU can be applied to ISDS because the investor is asking the court to enforce an obligation between the country in which the investor has invested, and the investor’s home country.\(^ {163}\) Schill argues that Article 344 TFEU only applies in relations between Member States and does not impose any obligations on the EU.\(^ {164}\) Reinisch argues that it is unlikely that the Mox Plant case can be applied to ISDS disputes, citing the Achmea case to support his argument.\(^ {165}\) In that case the argument of making the Mox Plant ruling applicable was rejected, on grounds of the difference between an investor-state dispute and a state-to-state dispute.\(^ {166}\)

Recently, the first case in an anticipated long series of cases involving Spain and solar energy companies was decided.\(^ {167}\) In this case, Spain argued that Article 344 TFEU includes ISDS disputes because the article should be interpreted as limiting a Member State from being “party to a dispute involving State responsibility.”\(^ {168}\) The tribunal did not agree with this understanding, citing the Electrabel tribunal’s more limited understanding of the article in support of its view:\(^ {169}\) That the purpose of Article 344 TFEU is primarily to ensure that the CJEU “has the last word in interpretation of EU law to ensure its uniform interpretation.”\(^ {170}\) However, the CJEU concluded in its Opinion 2/13 on the EU’s possible accession to the ECHR that such an accession could affect Article 344 TFEU “in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope ratione materiae of EU law being brought before the EctHR”\(^ {171}\)

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\(^{161}\) See for instance C-126/97 *Eco Swiss v. Benetton*, para 40

\(^{162}\) CJEU Opinion 1/09, para 63

\(^{163}\) Hindelang (2012) p 200

\(^{164}\) Schill (2013) p. 7

\(^{165}\) Reinisch (2013) p. 32

\(^{166}\) *Achmea v. Slovakia*, Award on Jurisdiction, Arbitrability and Suspension, para 276

\(^{167}\) *Charanne v. Spain*. This case was decided under the ECT, not a BIT, but for the purpose of this thesis the relevant questions are parallel.

\(^{168}\) *Charanne v. Spain*, para 442

\(^{169}\) Ibid., para 444

\(^{170}\) Ibid.; referring to *Electrabel v. Hungary*, paras 4.146-147

\(^{171}\) CJEU Opinion 2/13, para 258
The argument is that these disputes would be brought before the EctHR rather than the CJEU, and thus circumvent the CJEU’s jurisdiction. The same could be said about ISDS disputes.

In light of this backdrop, the Commission argues that there are limits on the types of dispute settlement that is available for EU Member States’ disputes. For instance, in its formal notice to Sweden of June 19 2015, the Commission cites the case of Czech Republic v Commission172 in which the General Court decided that after the Czech Republic’s accession to the EU, it could no longer rely on its right pursuant to an agreement with the Commission for the settlement of disputes outside of a court of law through negotiations. The Commission used this case to argue that TFEU Article 344 bars EU Member States from settling disputes regarding the interpretation and application of EU law in other ways than what the EU Treaties stipulate.173 Moreover, the Commission argued that the ISDS provision in the Sweden-Romania BIT, Article 7, was contrary to the EU’s unity and functioning, in light of which TFEU Article 344 should be interpreted, because once a dispute is referred to arbitration it is outside of the jurisdiction of the national courts and the CJEU alike and these cannot ensure that the objects of the EU and its unity and functioning is ensured.174 The Commission continues its critique of the Sweden-Romania BIT by arguing that it is unacceptable that two Member States oppose the normal judiciary means of the EU, and that the BIT challenges the principles of mutual trust and loyal cooperation between the Member States.175 The Commission ends by stating that the ISDS process excludes third parties, who in a normal court of law would have certain legal rights to voice their opinion and that the rights conferred by Article 7 are directly discriminating since investors from other Member States do not have the same opportunity to settle a dispute through investor arbitration.176 In its reply to the Commission, Sweden argues that TFEU Article 344 does only apply in disputes between Member States, and that there are no rules in the EU legal order that stipulate that a dispute between an investor and a Member State shall be decided by a national court.177

Investor-state disputes fall between the two typical characterizations of private disputes and state-to-state disputes. It could be argued that what makes investor-state disputes special is the fact that the respondent is a state, which is an argument in favor of applying rules that normally apply to state-to-state disputes.

172 T-465/08 Czech Republic v. Commission paragraphs 101-102
174 Ibid.
176 Ibid.
177 Sweden's answer to the Commission, p. 10
On the one hand, since it is ultimately the Member States that have granted an investment treaty arbitral tribunal with the competence that it has, it could be argued that the dispute is “submitted” by the Member State to investment arbitration for this reason. On the other hand, the phrasing of the article is to “submit” the dispute to arbitration. While the legal basis for the submission is undertaken by the Member States, it is the private investor who submits the dispute for arbitration. There appears to be no known cases in which the Claimant was the state. Yet, the fact that the Member States allow for this type of adjudication through engaging in the BIT should weigh heavily when interpreting Article 344 TFEU. The investor is claiming the right to arbitration that exists because of the BIT. A narrow interpretation of the phrasing “submit” would skew Article 344 TFEU in favor of the claimant-investor. For ISDS this would produce the undesirable result where, in a theoretical situation where the state had a claim against an investor pursuant to a BIT – for instance a counter-claim – the state could not “submit” this to arbitration, but the investor could submit its claims.

Therefore, the Mox Plant ruling should be applicable to investor-state disputes. The Member States are required to execute and balance its obligations in manner that is loyal towards the EU. It seems contrary to this purpose that the Member States could bilaterally avoid an EU treaty obligation such as the one in Article 344 TFEU. This thesis concludes that in light of its purpose and functioning, Article 344 TFEU should be interpreted as including investor-state disputes.

4.1.4 Article 19(1) TEU: Resolving EU disputes without the CJEU’s last word

Another basis for a possible incompatibility with ISDS adjudication and EU adjudication, is Article 19(1) TEU, which the CJEU has stated is the basis for its exclusive jurisdiction. Schill argues that the only basis for a possible incompatibility between adjudication pursuant to EU law and ISDS is found in the last sentence of this article, which gives the CJEU the exclusive competence to “ensure that in the interpretation and application of the Treaties the law is observed.” The question in this chapter is what limits this article imposes on the compatibility of ISDS courts adjudication disputes involving “the interpretation and application of the Treaties” – which this thesis concluded in chapter 3 that ISDS tribunals have to do when the subject of the dispute is a EU competence.

178 Case C-459/03 Commission v. Ireland (Mox Plant), para 169; Article 4(3) TEU
179 Previously Article 220(1) of the Treaty establishing the European Community; Dimopoulos (2011) p. 87; Opinion 1/00 para 11
180 Schill (2013) p. 7
181 Article 19(1)(2) TEU
The CJEU has a monopoly on the final word of the interpretation and application of EU law.\textsuperscript{182} Still, the CJEU does not \textit{de facto} have a monopoly on the interpretation of EU law, as EU law is interpreted all the time by courts and tribunals. There are ample situations in which such a monopoly would not apply: in \textit{Electrabel} the tribunal brings up the example of a Japanese court deciding a dispute between an EU company and a Japanese company. The Japanese court might very well have to interpret and apply a mandatory rule of EU law in order to solve the dispute. If the decision of the Japanese court is not enforced in the EU territory, the case will be completely outside the scope of jurisdiction of the CJEU.\textsuperscript{183} Yet, it is also true that the interpretation the Japanese court would conclude with will have no binding effect on how that same rule is to be interpreted by the CJEU.

The issue of binding interpretations was further elaborated on in Opinion 1/00 on the establishment of a European Common Aviation Area (“ECAA”): The CJEU wrote that autonomy of the EU legal order necessities that

\begin{quote}
“… the procedures for ensuring uniform interpretation of the rules of the ECAA Agreement and for resolving disputes will not have the effect of binding the Community and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Community law referred to in that agreement.”\textsuperscript{184}
\end{quote}

Additionally,

"the agreement must make it possible to anticipate and prevent any such undermining of the objective enshrined in Article 220 EC that Community law should be interpreted uniformly and of the Court's function of reviewing the legality of the acts of the Community institutions"\textsuperscript{185}

Does this apply to ISDS tribunals? Assuming that an ISDS tribunal would have to apply EU law as law, notwithstanding whether the interpretation of the tribunal is not a review of the legality of EU law, nor binding on any EU institution, it is binding on the parties to the case.

\textsuperscript{182} This understanding has been expressed in numerous investment treaty arbitral tribunals’ decisions, such as in \textit{Achmea v. Slovak Republic. Award on Jurisdiction, Arbitrability and Suspension} para 282 and in \textit{Electrabel v. Hungary, Decision on Jurisdiction}, para 4.147
\textsuperscript{183} \textit{Electrabel v. Hungary}, Decision on Jurisdiction, para 4.149
\textsuperscript{184} Opinion 1/00 paras. 12-13
\textsuperscript{185} Ibid., para 11
and might leave the state in a catch-22 situation, as in the previously mentioned *Micula* case. Furthermore, the ISDS tribunals might undermine the uniform interpretation and possibility of review by the CJEU given that there is no possibility for review through preliminary rulings or otherwise. The conclusion is that ISDS is a violation of Article 19(1) TEU.

4.1.5 Conclusions on the potential incompatibility with Articles 267 and 344 TFEU and Article 19(1) TEU

This thesis concludes that the EU legal framework ought to be perceived as primarily international law, although it is also clear that it has characteristics that sets it apart from many other sources of public international law. Following that conclusion, an ISDS tribunal in a dispute brought under an intra-EU BIT should apply EU law in order to perceive the whole picture the dispute exists in, and oftentimes, the reason why the dispute has arisen. Applying and interpreting EU law as law seems necessary in order to adequately solve the dispute in a balanced way, and avoid unsustainable result that highlight the discrepancies between the EU’s adjudication system and that of BITs. The distinction between applying law as law or as facts, as some investment treaty arbitral tribunal have used to justify its jurisdiction, seems artificial as you can never apply any law, even as a “fact”, without interpreting it in a context. Even if, as stated in *Electrabel*, the tribunal does not evaluate the validity of the EU act of law it still interprets the provision and incorporates it as part of the dispute resolution.

ISDS tribunals should have a duty to refer questions of interpretation of EU law to the CJEU for a preliminary reference, in order to ensure the autonomy of EU law and that the jurisdiction of the CJEU is not violated pursuant to Article 267 TFEU. Even if there is a possibility for review by domestic courts and ultimately the CJEU as part of set-aside or enforcement proceedings is likely, a preliminary reference in the initial proceedings is a faster way to dispute resolution than to wait until the award is being enforced in an EU country. If the arbitration follows ICSID rules instead, the picture is more complex as the ICSID Rules Articles 51 and 53 do not allow non-ICSID review. Allowing preliminary references from an ICSID tribunal might be a path forward while the EU is staking out the course of its future in-

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186 Dimopoulos (2011) p. 90
187 For instance the *Micula v. Romania* dispute is based on measures Romania took in response to its EU Accession, see *Micula v. Romania*, Final Award, para 130
188 *Achmea v. Slovakia*, Decision on Jurisdiction, Arbitrability and Suspension, para 283; *Electrabel v. Hungary*, Decision on Jurisdiction, para 4.198
189 *Electrabel v. Hungary*, Decision on Jurisdiction, para 4.198
190 The only way this will not the case is if the tribunal’s seat is outside of the EU, and the award is enforced in a non-EU country because the party has assets there
191 Rovetta (2013) p. 227
vestment policy. A tribunal not awarded the possibility or duty to refer a question for a preliminary reference, should not interpret and apply EU law.\textsuperscript{192}

Since it is unclear whether ISDS tribunals have a right to refer questions for preliminary ruling to the CJEU, and since they do not utilize this right if it exists, this type of adjudication is not provided for within the EU Treaties as stipulated in Article 344 TFEU. Article 344 TFEU and the \textit{Mox Plant} ruling should be applicable to ISDS disputes.

Moreover, the ISDS adjudication process is a violation of Article 19(1) TEU as the ISDS tribunals issue \textit{inter partes} binding awards and there is, the way the system is practiced today, no recourse to review this interpretation or application by the CJEU.

The ISDS adjudication process for provided for in intra-EU BITs is then incompatible with Article 344 TFEU and Article 19(1) TEU in so far as the dispute is concerning the interpretation or application of the EU Treaties,\textsuperscript{193} which this thesis concluded in chapter three that intra-EU BIT disputes usually do. However, it should be borne in mind that many tribunals have avoided this conclusion by stating that it can resolve the dispute without applying and interpreting EU law.\textsuperscript{194} The \textit{kompetenz-kompetenz} principle allows the investment treaty arbitral tribunal to avoid contentious issues: There seems to be developing a pattern of tribunals that find that it has jurisdiction to hear the case, and that it does not need to interpret and apply EU law to solve the dispute, as in the \textit{Electrabel} case\textsuperscript{195} and the \textit{Eastern Sugar} case.\textsuperscript{196} The conclusion of this thesis is that this is an inadequate adjudication of intra-EU BIT disputes, which does not take into account the whole picture of the disputes, for the reasons stated above.

Since the ISDS tribunals should deem EU law primarily as international law, it needs to apply EU law to the dispute to the extent that this is necessary, and following the conclusions stated above, deem ISDS adjudication a violation of the relevant mentioned provisions of EU law and reject jurisdiction to hear the case.

\textsuperscript{192} Hindelang (2012) p. 205
\textsuperscript{193} Article 344 TFEU and Article 19(1) TEU
\textsuperscript{194} For instance \textit{Electrabel v. Hungary}, Award, Part X Summary, para 10.2
\textsuperscript{195} \textit{Electrabel v. Hungary}, Decision on Jurisdiction, Applicable Law and Liability, para 4.198
\textsuperscript{196} \textit{Eastern Sugar}, Partial Award, para 197
4.2 Supremacy challenges in an EEA framework from a Norwegian perspective

While intra-EU BITs slowly seem to be approaching their demise, Norway is currently in the process of enacting a new model-BIT. Given this backdrop, what implications can be drawn from the EU’s experience with supremacy challenges with intra-EU BITs? In this section, the thesis will first provide a short introduction to international investment law in Norway. Second, it will consider if there are similar supremacy challenges that arise in relation to the EEA Agreement, and, third, if there are similar supremacy challenges that arise in relation to Norwegian internal law.

4.2.1 International investment law in Norway

All of Norway’s BITs are with countries that were not members of the EU at the time of the ratification. The reason for this is likely more political than legal. These countries are Eastern European countries where increased trade after the fall of the Soviet Union was desirable, whereas Norway already had a lot of trade with the Western European countries. Furthermore, in the early 1990s, it was still unclear whether Norway would join the EU. Norway ratified BITs with Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland and Slovakia in the early 1990s, and these are all countries that joined the EU in 2004. Romania, with which Norway also ratified a BIT in the 1990s, joined in 2007.

Since the early 2000s, constitutional issues connected to BITs have been repeatedly debated in Norway. That BITs and free trade agreements may run into constitutional issues is not a uniquely Norwegian issue. For instance, it has been argued that all in all 14 EU Member States might have to hold a referendum in order to accept a potential EU accession to the TTIP.

As mentioned in the introduction, Norway is currently developing a new model BIT agreement, of which the draft is public. The purpose of the new model agreement is still unclear, and without knowledge of which countries Norway envisions that it will sign BITs with, it is difficult to analyze the potential repercussions of the new draft model agreement, both within Norway and in the host countries. In the public consultation letter, the Ministry of Trade, Industry and Fisheries states that the objectives are:

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197 Royal Norwegian Ministry of Trade, Industry and Fisheries (2015)
198 Eschbach p. 35
199 PluriCourts (2015) p. 6
“...to protect Norwegian investments abroad, particularly in countries with unstable political and economic situations, and to ensure that Norwegian businesses can compete on equal terms with businesses from other countries. An important consideration is that such agreements should promote investment, and thus economic development, in developing countries.”

It seems like Norway’s intentions with the new model-BIT, should it be applied to BIT negotiations, is primarily to engage in BITs with developing countries rather than other European countries. However, the public consultation letter does not include a similar statement as was included in the public consultation letter for the 2008 model agreement draft: “The enclosed model agreement has been drafted with a view to negotiations with developing countries and countries with economies in transition.” It is too early to tell whether this omission is of significance or not, but it is safe to conclude that Norway’s intentions with the new model agreement potentially might conclude both BITs with developing and developed countries. Although there is no immediate connection between the Norwegian draft model agreement and the current status quo of the TTIP negotiations and the CETA, Norway should evaluate its options regarding intra-European trade. Europe is Norway’s most important trade partner, as 80% of Norwegian exports go to the EU, and 65% of Norwegian imports originate from EU countries. At the other end of the table, Norway is the EU’s fifth most important import trade partner and seventh most important export market. Thus, there is a clear discrepancy in so far that ensuring favorable conditions for trade to and from the EU is more important for Norway than vice versa.

4.2.2 Advisory opinions to the EFTA Court and uniform interpretation of the EEA Agreement

The EEA Agreement includes a similar provision to Article 267 TFEU on preliminary references, which is the Surveillance and Court Agreement Article 34. This article gives the EFTA Court the “jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.” Compared to Article 267 TFEU, the difference is that this is only a right the courts or tribunals in EFTA states have, not a duty. Furthermore, the advisory opinions offered by the EFTA Court are, precisely, advisory, i.e. not binding. This is contrary to the CJEU’s preliminary rulings, which are binding on all the national courts of the EU Member States.

201 Royal Norwegian Ministry of Trade, Industry and Fisheries (2008); Norum (2016)
202 Delegation of the European Union to Norway
203 European Commission, Trade (2015)
204 Eur-Lex (2014)
Can an ISDS tribunal refer a question to the EFTA Court for an advisory opinion on the interpretation of the EEA Agreement? It is regulated in the Norwegian Arbitration Act Article 30(2), that an arbitral tribunal may, as part of its proceedings, ask a Norwegian court to make a reference to the EFTA Court. The question is if it could make the reference directly. This depends on whether the tribunal is deemed a “court or tribunal in an EFTA State” within the ambit of Article 34 of the Surveillance and Court Agreement. Arnesen has argued that as far as commercial arbitration tribunals apply, it is likely that they cannot.\textsuperscript{205} He supports the conclusion with a standpoint from the case of \textit{Ravintoloitsijain}, in which the EFTA Court stated that although the EFTA Court is not obliged to follow the lead of the EC Court of Justice (now the CJEU) in its interpretations of the parallel provision of what is now Article 267 TFEU, the reasoning of the Court is relevant.\textsuperscript{206} As has been established in chapter 4.1.1, it follows from CJEU jurisprudence that commercial arbitral tribunals cannot refer questions for preliminary reference. Arnesen adds that even if one were to consider that the tribunal could have the right to ask for an advisory opinion, it would not have a duty – and subsequently, it is not very likely that the tribunal would have taken the opportunity, given that it is time-consuming.\textsuperscript{207}

Would this be different for an ISDS tribunal? There is no clear and specific precedent to support that ISDS tribunals can or cannot refer a question the the CJEU for a preliminary reference, so there is no clear conclusion from which the EFTA Court could draw implications. This thesis has concluded that ISDS tribunals ought to have a duty to make a preliminary reference in order to ensure uniform interpretation of EU law and compliance with the EU system of adjudication. In the event that an intra-EEA dispute arises under a BIT between two EEA countries, for instance Norway and one of the EU Member States it has a BIT with, the same reasoning applies. However, as with commercial arbitration, it would be a right and not a duty.

There is no equivalent to Article 344 TFEU in the EEA Agreement.\textsuperscript{208} Article 111(1) of the EEA Agreement, mentioned in chapter 3.5 of the thesis, has certain similarities with Article 19(1) TEU. Article 111(1) EEA stipulates that “The Community or an EFTA State may bring a matter under dispute which concerns the interpretation or application of this Agreement before the EEA Joint Committee in accordance with the following provisions.” However, there

\textsuperscript{205} Arnesen (1996) p. 625
\textsuperscript{206} Case E-1/94 \textit{Ravintoloitsijain Liiton Kustannus Oy Rentamark}, para. 24
\textsuperscript{207} Arnesen (1996) p. 626
\textsuperscript{208} Arnesen (2016)
is a large difference between Article 19(1) TEU and this article: the EEA article offers the right to ask for an interpretation, whereas Article 19(1) TEU obliges the CJEU to ensure that the law is observed when the EU treaties are interpreted or applied. Because of this voluntary element, there is no parallel issue of supremacy from the EEA perspective as in the EU case.

4.2.3 Supremacy challenges in regards to the Norwegian constitution

The issue of the Norwegian court’s system right to interpret Norwegian law in the last instance, can be compared to the CJEU’s role as the exclusive interpreter of EU law. The two situations are similar because they both relate to compatibility with the exclusive jurisdiction of the highest court pursuant to the two legal systems. At the same time, the contexts are different because the Norwegian legal system is a domestic system, whereas the EU Treaties:

“... constitutes the constitutional charter of a Community based on the rule of law. The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals.”

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In relation to Norwegian law, the question of incompatibility between the ISDS in a BIT and the Norwegian law relates especially to the Constitution Articles 88 and 90.

4.2.3.1 Is ISDS with direct internal effect incompatible with the Norwegian Constitution Articles 88 and 90?

Articles 88 and 90 state that the Norwegian Supreme Court is the final instance in the court system, and that its decisions cannot be appealed. However, these provisions do not require that only courts within the Norwegian court system can decide disputes in Norway. There is no equivalent to Article 344 TFEU in Norwegian law. The possible incompatibility lies in that the ISDS tribunal can, theoretically, review and set aside laws, regulations and decisions taken by the Norwegian government, and that the decisions have direct internal effect. 210 There has not been any arbitration case against Norway under the active Norwegian BITs.

Decisions and awards from international or foreign courts or tribunals in disputes between private parties can have direct internal effect without violating Article 88. 211 There are many scenarios in which the Norwegian state can be a party to a dispute rendered outside of Nor-

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209 Opinion 1/91, Summary para 1
210 Alvik and Dolva (2006) p. 9
211 Ibid., p. 9
way, and in which the decision has direct effect. The Arbitration Act Article 45 states that arbitration awards shall be recognized and enforced no matter where they were decided. When the respondent party is the state, there is no requirement under ICSID or under Norwegian law for execution of the award through court enforcement proceedings. Thus, in relation to investment arbitration, the relevant part of the direct effect is the finality of the arbitral decision. Is the finality of a potential arbitral award pursuant to the currently in force Norwegian BITs incompatible with the Norwegian Constitution Articles 88 and 90?

Some existing Norwegian BITs go far in granting the investor procedural rights to bring claims based on alleged violations of domestic laws. The Norway-Romania BIT gives the investors a right to bring in front of an arbitral tribunal “any dispute between one contracting party and an investor of the other contracting party concerning an investment of that investor in the territory of the former contracting party.” (Emphasis added) Thus, there seems to be no requirement as to the origin of the dispute coming from international law or from the substantial provisions of the BIT. It is not publicly known that this treaty has ever been interpreted by an ISDS tribunal. An ISDS tribunal could theoretically interpret Article VIII of the Norway-Romania BIT as granting the tribunal jurisdiction to decide disputes that are solely stemming from Norwegian law. Alvik and Dolva as well as the Ministry of Justice and Public Security’s Legal Department, have deemed this type of final decision over the interpretation of a sovereign act of the Government a violation of the supremacy of the Norwegian courts as the institution in charge of judicial review of the State’s actions.

This scenario of challenging sovereignty might not arise very often because it has limited practical application. There are to date no known examples of an ISDS case in which the tribunal has set aside a domestic legal act or decision in a dispute based on domestic laws. In the cases where the investor has plead a violation based on domestic laws, the issue for the tribunal has been whether compensation is due or not. Notwithstanding the likelihood of the

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212 One example is decisions that fall within the scope of the Lugano convention on jurisdiction and the enforcement of judgments in civil and commercial matters

213 Norwegian Arbitration Act Article 45

214 ICSID article 55 and article 54 no. 3; Norwegian Enforcement Act Article 1-2; Alvik and Dolva (2006) p. 10

215 Norway-Romania BIT (1992) Article VIII

216 Alvik and Dolva (2006) p. 11 and note 26 with further case-law references, see CMS v. Argentina (2005) for an example of a case where the tribunal deemed itself jurisdiction over a claim based on Argentinian law in a case relating to compensation

217 Alvik and Dolva (2006) argue that the Norwegian Constitution Articles 88 and 90 are violated if the BITs or the investment agreements touch upon the judiciary’s competence or constitutional roles, p. 9


219 Examples include CMS v. Argentina (2005)
scenario, opening up for such a competence for the tribunals by engaging in BITs with dispute resolution clauses such as the Norway-Romania BIT seems to be in violation of the Norwegian Constitution Articles 88 and 90.

Would this conclusion be affected by the type of arbitration used? This thesis has previously concluded that both ICSID tribunals and non-ICSID tribunals should have a duty to refer a question for a preliminary ruling because there is no guarantee that an award will be enforced or challenged through domestic court proceedings in a EU Member State. Some Norwegian BITs offer ICSID arbitration as the only arbitration alternative, just like the new draft model agreement does. However, quite a few offer ad hoc arbitration under the UNCITRAL rules, either as an alternative or as the only arbitration option. As stated in chapter 4.1.2 this type of arbitration may be subject to post-decision review by domestic courts in set-aside or enforcement proceedings. Would the possibility for such review by the Norwegian domestic courts be sufficient to avoid the conclusion that ISDS adjudication is a violation of the Norwegian Constitution Articles 88 and 90? A reasonable interpretation of the articles makes the likely answer no: the phrasing of Article 88 is that the Supreme Court judges in the final court instance, and of Article 90 that its decisions cannot be appealed (My translations). Set-aside or enforcement proceedings are not substantial hearings of the merits of the case, and they are not comparable to an appeal of the ISDS award. They serve a different purpose than dispute resolution of the merits of a case.

The new model draft agreement limits any remedy to pecuniary compensation. This would likely solve the issue of constitutionality, as the incompatibility is the arbitral tribunal’s possible jurisdiction to set aside a Norwegian law or decision with binding direct effect for the parties. A decision that does not set aside the relevant provision of law, but only renders compensation, would not be incompatible with the Norwegian Constitution Article 88 and 90 as a duty to pay compensation does not affect the Norwegian Government’s legislative powers.

Norwegian scholar Høgberg has in an EEA setting asked the question of whether it is possible to say that the legislature has conserved all of its sovereignty when it is subject to paying

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220 Chapter 4.1.1 and 4.1.2
221 For instance, the Norway-Romania BIT Article VIII(2)
222 Article 14 (3) of the Norwegian Draft Model Agreement
223 Norway-Czech Republic BIT and Norway-Slovakia BIT Article VIII(c); Norway-Estonia BIT Article IX; Norway-Latvia BIT Article IX(2)(b); Norway-Poland BIT Article X
224 Article 17(2) of the Norwegian Draft Model Agreement
I believe that it is – there is no threat to the sovereignty of the state even if it has to pay compensation, because it has all of its legislative powers intact.

\[226\] Høgberg (2008) p. 167
5 Ideas for an ever closer union: suggestions for resolving the procedural challenges of ISDS in Europe

The future of BITs within Europe is unclear, but seems less than promising due to the panoply of challenges mentioned in this thesis. There is a lot happening in the field of investment law right now: the public opinion of BITs and ISDS in Europe at the moment is controversial, largely because of the on-going TTIP negotiations and the CETA. While waiting to see what the outcome of these negotiations and agreements will be, this thesis will present some ideas for a more sustainable procedural framework around ISDS BIT provisions within Europe.

5.1 The EU perspective

One approach to solving the challenges mentioned in this thesis would be to decide that the only applicable law will be the treaty itself and rules of international law, thus excluding EU law from being applicable in disputes regarding third countries, and avoiding the issue of having an arbitral tribunal interpret and decide disputes based on EU law.227 This could be possible if the BITs limit the type of disputes that can be brought to ISDS arbitration to disputes arising out of a violation of a BIT provision or general international law, excluding both domestic and EU law. However, this might lead to some rather unfair decisions in the light of EU Member States, who would then be deprived of the possibility to use EU law as a defense for its actions. One example would be that if EU law mandates a certain energy regulation, which prompts a claim of breach of the fair and equitable treatment standard from an investor, the Member State in question could not use the regulation itself as a defense as it would be regarded as domestic law, which cannot excuse violations of international law pursuant to VCLT Article 27. Regardless of whether the EU law should be deemed a “sui generis” system, it is undoubted that it’s a unique regional system that requires a high level of loyalty from the Member States executing the obligations. Therefore, this approach would not be ideal.

Alternatively, if EU law is applicable to the dispute, an ISDS tribunal should have a duty to submit questions of interpretation of EU law to the CJEU for preliminary reference pursuant to Article 267 TFEU.228 In that scenario, the ISDS arbitration might not be inconsistent with Article 344 TFEU despite that the Tribunal applies EU law. This is especially true for ICSID tribunals, although the solution would likely not be popular viewed from a public international law perspective.

227 Schill (2013) p. 14
228 Opinion 1/09; Schill (2013) p. 14
5.2 The Norwegian perspective

One issue that arises in relation to the Norwegian case, but not in the EU, is the consequences of limiting the remedies to pecuniary damages. If the Norwegian draft model agreement is applied in its current form, the issue of a potential incompatibility with the Norwegian Constitution seems to be eliminated. The constitutional challenges can to a large degree be avoided by limiting the investor’s right to bring a lawsuit to arbitration to situations in which the dispute stems from a potential violation of the substantive standards of protection in the BIT in question, or of public international law in general, thus excluding cases based on violations of domestic law.\(^{229}\) The draft model agreement limits any award to pecuniary damages,\(^ {230}\) and any dispute must arise from a violation of an obligation pursuant to the BIT,\(^ {231}\) thus excluding disputes based on domestic law violations. Furthermore, it limits the applicable law for a Tribunal to interpreting the BIT in line with relevant international law.\(^ {232}\) Therefore, the issue of having another tribunal or court with binding and final effect interpret and decide the Norwegian law instead of the Norwegian Supreme Court is no longer relevant. Although it is uncertain whether this is explicit or coincidental, it seems that the Norwegian draft model agreement has indeed incorporated the most important lesson’s learned from the EU’s experience with intra-EU BITs: To limit the applicable law through the type of dispute available.\(^ {233}\)

\(^{229}\) Alvik and Dolva (2006) p. 31

\(^{230}\) Norwegian Draft Model Agreement Article 17(2)

\(^{231}\) Ibid., Article 14(1)

\(^{232}\) Ibid., Article 13(1)

\(^{233}\) Similar challenges have been experienced by countries with BITs all over the world, and it is likely that the implications Norway has drawn comes from observing the global experiences, not only the EU’s.
6 Concluding remarks

The conclusion of this thesis is that the adjudication process under intra-EU BITs the way it is practiced today, in disputes involving EU law, is a type of adjudication “not provided for” in the EU treaties, as stipulated in Article 344 TFEU. As the EEA agreement does not have a parallel provision to Article 344 TFEU, ISDS adjudication is compatible with the EEA Agreement. The existing Norwegian BITs are not compatible with the Norwegian Supreme Court’s jurisdiction pursuant to Articles 88 and 90 of the Norwegian Constitution, but the new model draft agreement seems to be compatible with Norwegian law, as it has important limitations on the adjudication process.

Over the past ten years the Commission has expressed its discontent over the existence of intra-EU BITs, and their numbers are reducing. Most of the controversy towards intra-EU BITs is tied to the ISDS provisions. In the light of EU’s major regional free trade agreements with investment chapters with ISDS that are currently being negotiated or awaiting enactment, ISDS through intra-EU BITs’ is slowly diminishing in usefulness and desirability. Although certain Member States continue to insist that they wish to keep the intra-EU BITs, the empirical evidence as to the effectiveness of BITs to improve flows of FDI is ambiguous. Since BITs are controversial and usually have an end-date in the BIT itself, it is likely that the future of IIAs in Europe will be characterized by fewer and fewer intra-EU BITs and more FDI management on the EU level. This conclusion is supported by the fact that since the enactment of the Treaty of Lisbon, Articles 206 and 207 TFEU render FDI an exclusive community competence, in which only the EU can act. This evolution implies that the number of ISDS cases within Europe will probably increase in the coming years, as it is documented that the chance of an investor from a developed country bringing a case to arbitration is larger than an investor from a developing country.

Whereas EU Member States before the enactment of the Treaty of Lisbon could not engage in new intra-EU BITs, after the enactment they cannot engage in new extra-EU BITs either.

234 As noted in chapter 2.1, The Netherlands opposes termination of BITs.
235 Dimopoulos (2011) p. 15
236 Article 2.1 TFEU
237 UNCTAD, World Investment Report 2015, p. xi
238 Whether new intra-EU BITs would be legally impossible for Member States or just politically impossible, could be debated. Hindelang argues that intra-EU BITs violate EU fundamental freedoms (Hindelang 2011 p. 220), and if that’s the starting point, it seems logical that Member States cannot bilaterally agree to violate the EU fundamental freedoms, applying a similar logic to the one expressed in the Mox Plant case (Case C-459/03 Commission v. Ireland (Mox Plant), paras 123 ff.), see chapter 3.1.
Yet, the limits of this competence has still not been cemented, and EU Member States have continued to engage in new extra-EU BITs.\textsuperscript{239} The TFEU does not define the term “foreign direct investment” and thus leaves room for limit testing.\textsuperscript{240} Therefore, whether any EU countries will be willing to engage in a new BITs with Norway even if Norway negotiates new BITs, is unclear. If the EU shall engage in IIAs with third-countries such as Norway, the BITs between Norway and EU Member States will first have to be terminated.\textsuperscript{241} It is not known whether Norway would be interested in this, though. It is also not yet publicly known whether the existing Norwegian BITs will be renegotiated.\textsuperscript{242}

Will the regional FTAs impact the functioning of already existing intra-European BITs? It seems logical that these agreements will make the European countries not part of the agreements, like Norway,\textsuperscript{243} less attractive as a trade partner. Consequently, the existing BITs might become less attractive too. Norway already has very good trade conditions with the EU as part of the European internal market through the EEA, but if the TTIP and CETA go through, Norway needs to analyze its steps carefully in order to ensure the continued competitive access to its most important trade partner’s markets.

This thesis has touched on different ways of mitigating the complexity of these disputes, but depending on the perspective taken, all of the provided solutions have their shortcomings. This is why the system as a whole is likely to change. Norway’s BITs with EU Member States will be part of this transformation as the BITs Norway have with EU Member States will be part of EU’s new common commercial policy.\textsuperscript{244} Therefore, investors should be more concerned about the EU law incompatibility with future BITs with Norway than the other way around.

Some of the parallel issues highlighted in this thesis have turned out not to be as parallel as assumed, as Norway and the EU are in quite different positions regarding their investment policy plans right now. At the same time, it seems like Norway has indeed drawn parallels from the EU’s experience with intra-EU BITs when designing the new model draft agreement.

\begin{itemize}
\item \textsuperscript{239} UNCTAD (2011) p. 101
\item \textsuperscript{240} Chaisse (2012) p. 59
\item \textsuperscript{241} EU Regulation No 1219/2012 Article 3
\item \textsuperscript{242} Norum (2016)
\item \textsuperscript{243} As of late April 2016 there is no known Norwegian mandate to negotiate any of the regional free trade agreements that the EU is negotiating and enacting
\item \textsuperscript{244} Article 207 TFEU
\end{itemize}
For Norway, the implications of the experiences of the EU in this regard are more political than legal. It is peculiar that Norway is dusting off its BIT ambitions at the same time as the rest of the world seem to be moving towards a more regional approach. Norway should continue to pay close attention the actions of the EU in this regards, to ensure that the investment protections for Norwegian investors do not fall between the two chairs of slowly diminishing in value intra-European BITs and the future FTAs with investment chapters.
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8 List of Legal Sources

8.1 Laws, Directives and Regulations:

<table>
<thead>
<tr>
<th>Year</th>
<th>Description</th>
</tr>
</thead>
</table>
responsibility linked to investor-to-state dispute settlement tribunals established by international agreements to which the European Union is a party

### 8.2 Treaties

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>CETA</td>
<td>EU-Canada Comprehensive Economic and Trade Agreement (Treaty not yet ratified as of April 2016)</td>
</tr>
<tr>
<td>EC</td>
<td>Treaty Establishing the European Community of February 26 2001</td>
</tr>
<tr>
<td>EU-Singapore FTA</td>
<td>EU-Singapore Free Trade Agreement, Authentic text as of May 2015 (Treaty not yet ratified as of April 2016)</td>
</tr>
<tr>
<td>EU-Vietnam FTA</td>
<td>EU-Vietnam Free Trade Agreement: Agreed text as of January 2016 (Treaty not yet ratified as of April 2016)</td>
</tr>
<tr>
<td>ICSID Convention</td>
<td>Convention on the Settlement of Investment Disputes Between States and Nationals of Other States of March 18 1965 (The Washington Convention)</td>
</tr>
<tr>
<td>Lugano Convention</td>
<td>Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters</td>
</tr>
<tr>
<td>Netherlands-Czech Republic BIT</td>
<td>Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic of April 29 1991</td>
</tr>
<tr>
<td>Netherlands-Slovakia BIT</td>
<td>Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic of April 29 1991</td>
</tr>
<tr>
<td>Norway-Czech Republic/Slovakia BIT</td>
<td>Agreement Between the Czech and Slovak Federal Republic and the Kingdom of Norway on the Mu-</td>
</tr>
</tbody>
</table>
tual Promotion and Protection of Investments of May 21 1991


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TFEU

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